Supreme Court of the United States

OCTOBER TERM, 1965

No. 657

JAMES BROOKHART, PETITIONER

vs.

OHIO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

INDEX

[fol. A] * * *

[fol. B] [Motion to Proceed in the Forma Pauperis and Affidavit (omitted in printing)]

[fol. C]

IN THE SUPREME COURT OF OHIO

Case No. 39132

JAMES BROOKHART, 114-615, PETITIONER, PRO SE

vs

E. B. HASKINS, SUPERINTENDENT

LONDON CORRECTIONAL INSTITUTION ET AL. RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS—filed September 23, 1964

Addressing the Honorable Kingsley A. Taft, Chief Jutice of said SUPREME COURT OF OHIO

Now comes James Brookhart, herein after known as the Petitioner, now being confined in London Correctional Institution, Madison County, London, Ohio, by the above named respondent in direct violation of the Constitution of the United States, and in contravention of the Constitution of the Great State of Ohio.

Petitioner, contends that he has been deprived of his inalienable rights guaranteed him under the Fifth, Sixth, and Fourteenth Amendments of the Constitution of The United States, by the Grand Jury, Due Process and Equal Protection clauses thereof.

Having set forth the more general outline, Petitioner here and now makes formal application that the Honorable Court order his presence at the hearing of this action so that he, the petitioner, may present oral argument and

evidence in the support of his allegation of unlawful imprisonment.

In conclusion, petitioner predicates a prayer to the above Court for an order under its seal directing the respondent E. B. Haskins as Superintendent of London Correctional Institution to produce the body of the petitioner before the Court, at a time and place specified by the Court, and there to show just cause if any why your petitioner should not be forwith released from the imprisonment, he here contends is unlawful.

[fol. D] In a petition for a Habeas Corpus alleging unlawful restraint of liberty, without stating facts and reasons why such restraint was unlawful, is sufficient.

STATE v. MULLANEY 8 NP 165, 11D 120.

A petition for a Writ of Habeas Corpus which states: (1) The petitioner is imprisoned or restrained of his liberty; (2) That he is in the custody of E. B. Haskins, Superintendent of London Correctional Institution; (3) The place where he is held; (4) That the detention is illegal and which is signed and verified, states a good cause of action under the provisions of R.C. section 2725.04.

HUTCHIONS v. ALVIS 77 OLA 608, 151 NE (2d) 31.

Original jurisdiction is confered upon this Honorable Court by Article *4* Section *2* of the Ohio Constitution and by authority of Section 2725.02 of the Revised Code of Ohio. Therefore this petitioner prays that this Honorable Court will accept its jurisdiction and proceed to adjudication according to law.

Respectfully Submitted

/s/ James Brookhart
JAMES BROOKHART
Box 69
London, Ohio

Madison County)
) S S
State of Ohio)

I James Brookhart, Petitioner, Pro. Per., in the foregoing Petition for a Writ of Habeas Corpus, after first being cautioned and sworn, say that the allegations made the statments contained in said Petition are true.

/s/ James Brookhart
JAMES BROOKHART 114-615

Sworn and subscribed before me this 11 day of September 1964

/s/ Donald M. Weiss
Notary Public

DONALD M. WEISS
NOTARY PUBLIC
MY COMMISSION
EXPIRES 7 MAY 1967

[SEAL]

[fol. E]

[Proof of Service (omitted in printing)]

[fol. F] • • •

[fol. G]

IN THE SUPREME COURT OF OHIO

No. 39,132

JAMES EDWARD BROOKHART, PETITIONER

vs

E. B. HASKINS, Supt. London Correctional Institution
RESPONDENT

RETURN TO WRIT—filed October 13, 1964

Respondent denies each and every allegation in this cause except such allegations as are hereinafter admitted to be true either in this Return or the exhibits attached hereto.

Respondent says that as Superintendent of the London Correctional Institution he has the Petitioner, James Edward Brookhart, in his custody by virtue of a certain mittimus issued by the Court of Common Pleas of Stark County, Ohio, pursuant to his conviction for the crimes of forgery, uttering and publishing forged instruments, breaking and entering in the night season and grand larceny.

Copies of the indictments, journal entries appointing counsel, journal entries of sentence and certified copies of sentences are hereto attached and made a part of this Return.

E. B. HASKINS, Supt.
London Correctional Inst.

WILLIAM B. SAXBE
Attorney General

WILLIAM C. BAIRD
Assistant Attorney General

Attorneys for Respondent

[fol. H] EXHIBIT TO RETURN

Case No. 18139 SECRET INDICTMENT R. C. 2913.01

INDICTMENT FOR FORGERY, 4 counts, AND UTTERING & PUBLISHING, 4 counts

FELONY 114615

THE STATE OF OHIO, STARK COUNTY, ss.

In the Court of Common Pleas, Stark County, Ohio, of the Term of January in the year of our Lord one thousand nine hundred and Sixty-one.

The Jurors of the Grand Jury of the County of Stark and State of Ohio, then and there duly impaneled, sworn and charged to inquire of and present all offenses whatever committed within the limits of said County, on their said oaths, in the name and by the authority of the State of Ohio, do find and present:

That RONALD K. MITCHELL AND JAMES L. BROOKHART and DORIS MAE JONES aka Doris Mae Brookhart late of said County on or about the 8th day of October in the year of our Lord one thousand nine hundred and sixty, at the County of Stark, aforesaid did, with intent to defraud, falsely make, forge or counterfeit a certain check, which said false, forged or counterfeited check is of the purport and value, to-wit:

56-215
412

BEACON BOXES INC.
Massillon, Ohio

Number 361
October 8, 1960

Pay to the order of Jimmy Cox $57.58

THE SUM OF 57 DOLS 58 CTS Dollars

THE STATE BANK COMPANY
Massillon, Ohio

R. J. Buchannon Treasurer

SECOND COUNT

And the jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and

present that RONALD K. MITCHELL and JAMES L. BROOKHART and DORIS MAE JONES aka Doris Mae Brookhart, late of said County on or about the 8th day of October in the year of our Lord one thousand nine hundred and sixty, at the County of Stark aforesaid, did, with intent to defraud, utter or publish as true and genuine a [fol. I] certain false, forged or counterfeited check which said false, forged or counterfeited check, as appears in the first count of this indictment, they, the said Ronald K. Mitchell, and James L. Brookhart and Doris Mae Jones aka Doris Mae Brookhart, then and there at the time they so uttered or published said false, forged or counterfeited check, well knowing the same to be false, forged or counterfeited.

THIRD COUNT

And the jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and present that RONALD K. MITCHELL and JAMES L. BROOKHART and DORIS MAE JONES aka DORIS MAE BROOKHART, late of said County on or about the 8th day of October in the year of our Lord one thousand nine hundred and sixty, at the County of Stark aforesaid, did, with intent to defraud, falsely make, forge or counterfeit a certain check, which said false, forged or counterfeited check is of the purport and value, to-wit:

56-215
412

BEACON BOXES INC.
Massillon, Ohio

Number 367
Oct. 8, 1960

Pay to the Order of Jimmy Cox $57.82

THE SUM OF 57 DOLS 82 CTS Dollars

THE STATE BANK COMPANY
Massillon, Ohio

BEACON BOXES INC.
R.J. Buchannon TREASURER

FOURTH COUNT

And the jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and present that RONALD K. MITCHELL AND JAMES L. BROOKHART and DORIS MAE JONES aka DORIS MAE BROOKHART, late of said County on or about the

8th day of October in the year of our Lord one thousand nine hundred and sixty, at the County of Stark aforesaid, did, with intent to defraud, utter or publish as true and genuine a certain false, forged or counterfeited check which said false, forged or counterfeited check, as appears in the third count of this indictment, they the said Ronald K. Mitchell and James L. Brookhart and Doris Mae Jones aka Doris Mae Brookhart, then and there at the time they so uttered or published said false, forged or counterfeited check, well knowing the same to be false, forged or counterfeited.

FIFTH COUNT

And the jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and present that Ronald K. Mitchell and James L. Brookhart and Doris Mae Jones aka Doris Mae Brookhart, late of said County on or about the 8th day of October in the year of our Lord one thousand nine hundred and sixty, at the County of Stark aforesaid, did, with intent to defraud, falsely make, forge or counterfeit a certain check, which said false, forged or counterfeited check is the pur-
[fol. J] port and value, to-wit:

56-215
412

BEACON BOXES INC.
Massillon, Ohio

Number 374
Oct. 8, 1960

Pay to the order of Jimmy Cox $72.63

THE SUM OF 57 DOLS 82 CTS Dollars

THE STATE BANK COMPANY
MASSILLON, OHIO

BEACON BOXES INC.
R. J. Buchannon Treasurer

SIXTH COUNT

And the jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and present that RONALD K. MITCHELL and JAMES L. BROOKHART and DORIS MAE JONES AKA Doris Mae Brookhart, late of said County on or about the 8th day of October in the year of our Lord one thousand nine hundred and sixty, at the County of Stark aforesaid, did with intent to defraud, utter or publish as true and gen-

uine a certain false forged or counterfeited check which said false, forged or counterfeited check, as appears in the fifth count of this indictment, they the said Ronald K. Mitchell and James L. Brookhart and Doris Mae Jones aka Doris Mae Brookhart, then and there at the time they so uttered or published said false, forged or counterfeited check, well knowing the same to be false, forged or counterfeited.

SEVENTH COUNT

And the jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and present that RONALD K. MITCHELL and JAMES L. BROOKHART and DORIE MAE JONES aka Doris Mae Brookhart, late of said County on or about the 8th day of October in the year of our Lord one thousand nine and sixty, at the County of Stark aforesaid, did, with intent to defraud, falsely make, forge or counterfeit a certain check, which said false, forged or counterfeited check is of the purport and value, to-wit:

56-215
412

BEACON BOXES INC.
Massillon, Ohio

Number 364
Oct. 8, 1960

Pay to the order of Jimmy Cox $57.82

THE SUM OF 57 DOLS 82 CTS Dollars

THE STATE BANK COMPANY
Massillon, Ohio

BEACAN BOXES INC.
R. J. Buchannon Treasurer

EIGHTH COUNT

And the jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and present that RONALD K. MITCHELL and JAMES L. BROOKHART AND DORIS MAE JONES aka Doris Mae Brookhart, late of said County on or about the 8th day of October in the year of our Lord one thousand nine hundred and sixty, at the County of Stark aforesaid, did, with intent to defraud, utter or publish as true and genuine a certain false, forged or counterfeited check [fol. K] which said false, forged or counterfeited check, as appears in the seventh count of this indictment, they, the

said Ronald K. Mitchell and James L. Brookhart and Doris Mae Jones aka Doris Mae Brookhart, then and there at the time they so uttered or published said false, forged or counterfeited check, well knowing the same to be false, forged or counterfeited contrary to the statute in such cause made and provided, and against the peace and dignity of the State of Ohio.

NORMAN J. PUTMAN,
Prosecuting Attorney
Stark County, Ohio

[fol. L]

SECRET INDICTMENT

No. 18139

January Term, 1961

COURT OF COMMON PLEAS
Stark County, Ohio

THE STATE OF OHIO

vs

RONALD K. MITCHELL AND JAMES L. BROOKHART AND DORIS MAE JONES aka Doris Mae Brookhart

INDICTMENT FOR FORGERY 4 Counts, and UTTERING & PUBL. 4 counts

A TRUE BILL
Charles A. Laiblin

Foreman of the Grand Jury

Filed *March 3, 1961*

C. Frank Sherrard
Clerk

NORMAN J. PUTMAN
Prosecuting Attorney

[fol. M] EXHIBIT TO RETURN

Case No. 18101 R. C. 2907.10, 2907.20

INDICTMENT FOR BREAKING & ENTERING AND GRAND LARCENY

FELONY 114615

THE STATE OF OHIO, STARK COUNTY, ss.

In the Court of Common Pleas, Stark County, Ohio, of the Term of January in the year of our Lord one thousand nine hundred and sixty-one

The Jurors of the Grand Jury of the County of Stark and State of Ohio, then and there duly impaneled, sworn and charged to inquire of and present all offenses whatever committed within the limits of said County, on their said oaths, in the name and by the authority of the State of Ohio, do find and present:

That RONALD K. MITCHELL and JAMES EDWARD BROOKHART late of said County on or about the 10th day of October in the year of our Lord one thousand nine hundred and Sixty, at the County of Stark, aforesaid did, in the night season, maliciously and forcibly break and enter a certain building, to-wit: Beacon Boxes, Inc., located at 151 Lennox Avenue, S. W., Perry Heights, and owned by R. & S. Enterprises, aka Richard and Samuel Shapiro, with intent to steal property of value

SECOND COUNT

And the jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and present that RONALD K. MITCHELL AND JAMES EDWARD BROOKHART, late of said County on or about the 10th day of October in the year of our Lord one thousand nine hundred and sixty, at the County of Stark [fol. N] aforesaid, did steal a Speedrite check machine, the personal property of Beacon Boxes, Inc., and of the aggregrate value of more than Sixty ($60.00) Dollars con-

trary to the statute in such cause made and provided, and against the peace and dignity of the State of Ohio.

NORMAN J. PUTMAN
Prosecuting Attorney
Stark County, Ohio

[fol. O]

No. 18101
January Term, 1961

COURT OF COMMON PLEAS,
Stark County, Ohio

THE STATE OF OHIO

vs

RONALD K. MITCHELL and JAMES EDWARD BROOKHART

INDICTMENT FOR B & E AND GRAND LARCENY

A TRUE BILL
Charles A. Laiblin
Foreman of the Grand Jury

Filed *March 3, 1961*
Clerk

Norman J. Putman
Prosecuting Attorney

[fol. P]

EXHIBIT TO RETURN

FILED: Feb. 1, 1962
C. Frank Sherrard
Clerk of Courts
Stark County, Ohio

114615

IN THE COURT OF COMMON PLEAS

CASE NO. 18139

THE STATE OF OHIO, PLAINTIFF

vs

JAMES E. BROOKHART, DEFENDANT

STATE OF OHIO :
: SS:
STARK COUNTY :

JOURNAL ENTRY
COUNSEL APPOINTED

This day the defendant having been served with a copy of the indictment in this cause, appeared in open court, in the custody of the Sheriff, and the said defendant, being then and there without and unable to employ counsel, the Court hereby assigns JOHN ERGAZOS as counsel for said defendant in this cause, pursuant to the provisions of R. C. 2941.50.

PAUL G. WEBER Judge

APPROVED BY:

NORMAN J. PUTMAN
NORMAN J. PUTMAN, Prosecuting Attorney

[fol. Q]

FILED: Feb. 1, 1962
C. Frank Sherrard
Clerk of Courts
Stark County, Ohio

IN THE COURT OF COMMON PLEAS

CASE NO. 18101

THE STATE OF OHIO, PLAINTIFF

vs

JAMES E. BROOKHART, DEFENDANT

STATE OF OHIO :
: SS:
STARK COUNTY :

JOURNAL ENTRY
COUNSEL APPOINTED

This day the defendant having been served with a copy of the indictment in this cause, appeared in open court, in the custody of the Sheriff, and the said defendant, being then and there without and unable to employ counsel, the court hereby assigns JOHN ERGAZOS as counsel for said defendant in this cause, pursuant to the provisions of R. C. 2941.50.

PAUL G. WEBER Judge

APPROVED BY:

NORMAN J. PUTMAN
NORMAN J. PUTMAN, Prosecuting Attorney

[fol. R]

EXHIBIT TO RETURN

IN THE COURT OF COMMON PLEAS

CASE NO. 18139

THE STATE OF OHIO, PLAINTIFF

vs

JAMES EDWARD BROOKHART, DEFENDANT

STATE OF OHIO :
: SS:
STARK COUNTY :

JOURNAL ENTRY
FINDING OF GUILTY
BY THE COURT AND
SENTENCE IMPOSED

This cause came on for trial by the Court, the defendant having heretofore waived trial by jury, and the Court having heard the evidence and the arguments of counsel finds that the defendant is guilty of forgery on counts, one, three and five, and uttering and publishing on counts, two, four and six, but not guilty of forgery an uttering and publishing on counts seven and eight, as charged in the indictment.

Whereupon the Prosecuting Attorney moved that sentence be pronounced against the defendant. Whereupon the Court was duly informed in the premises on the part of the State of Ohio, by the Prosecuting Attorney, and on the part of the defendant, by the defendant himself, and thereafter the Court asked the defendant whether he has anything to say as to why judgment should not be pronounced against him, and the defendant, after consulting with his attorney, said that he had nothing further to say except that which he had already said, and showing no good and sufficient reason why sentence should not be pronounced, the Court thereupon pronounced sentence.

[fol. S] IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the defendant be committed to the Ohio State Penitentiary in Columbus for an indeterminate term of not less than one (1) nor more than twenty (20) years, or until otherwise pardoned, paroled or released according to law, on each of the three counts of forgery (R. C. 2913.01) as contained in counts one, three and five in the indictment, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant be committed to the Ohio State Penitentiary in Columbus for an indeterminate term of not less than one (1) nor more than twenty (20) years, or until otherwise pardoned, paroled or released according to law on each of the three counts of uttering and publishing (R. C. 2913.01) as contained in counts two, four and six in the indictment, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant shall serve the sentences in counts one, three and five consecutively, one after the other, and the sentences in counts two, four and six, concurrent and concurrently with the sentence in count one, and concurrently with the sentences in Case No. 18101, all of the aforesaid sentences being imposed by the Court of Common Pleas of Stark County, Ohio, in the January 1962 term and that the defendant pay the costs of this prosecution for which execution is hereby awarded.

/s/ PAUL G. WEBER Judge

APPROVED BY:

NORMAN J. PUTMAN, Prosecuting Attorney

[fol. T]

IN THE COURT OF COMMON PLEAS

CASE NO. 18101

THE STATE OF OHIO, PLAINTIFF

vs

JAMES EDWARD BROOKHART, DEFENDANT

STATE OF OHIO :
: SS:
STARK COUNTY :

JOURNAL ENTRY
FINDING OF GUILTY
BY THE COURT AND
SENTENCE IMPOSED

This cause came on for trial by the Court, the defendant having heretofore waived trial by jury, and the Court having heard the evidence and the arguments of counsel finds that the defendant is guilty of breaking and entering and grand larceny as charged in the indictment.

Whereupon the Prosecuting Attorney moved that sentence be pronounced against the defendant. Whereupon the Court was duly informed in the premises on the part of the State of Ohio, by the Prosecuting Attorney, and on the part of the defendant, by the defendant himself, and thereafter the Court asked the defendant whether he has anything to say as to why judgment should not be pronounced against him, and the defendant, after consulting with his attorney, said that he had nothing further to say except that which he had already said, and showing no good and sufficient reason why sentence should not be pronounced, the Court thereupon pronounced sentence.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the defendant be committed to the Ohio [fol. U] State Penitentiary in Columbus for an indeterminate term of not less than one (1) nor more than

fifteen (15) years, or until otherwise pardoned, paroled or released according to law, on the charge of breaking and entering (R. C. 2907.10) in the indictment, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant be committed to the Ohio State Penitentiary in Columbus for an indeterminate term of not less than one (1) nor more than seven (7) years, or until otherwise pardoned, paroled or released according to law on the charge of grand larceny (R. C. 2907.20) in the indictment, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant shall serve the sentences, each above, concurrently each with the other, and the sentences aforesaid shall be served concurrently with the sentences in Case No. 18139, all of the aforesaid sentences being imposed by the Court of Common Pleas of Stark County, Ohio, in the January 1962 term and that the defendant pay the costs of this prosecution for which execution is hereby awarded.

/s/ PAUL G. WEBER Judge

APPROVED BY:

NORMAN J. PUTMAN, Prosecuting Attorney

[fol. V] EXHIBIT TO RETURN

CERTIFIED COPY OF SENTENCE

At a term of the Court of Common Pleas, begun and held at the Court House in Canton within and for the County of Stark and State of Ohio, on the 26th day of March A. D. 1962.

Present, the Hon, Paul G. Weber . . . . Judge

In the Record and Proceedings of said Court, then and there had, among other things, is the following Judgment and Sentence, to-wit:

THE STATE OF OHIO) Indictment for FORGERY, 4
vs) counts, AND UTTERING &
James Edward Brookhart) PUBLISHING, 4 counts

The said James Edward Brookhart having been found guilty by the Court.

It is therefore the sentence of the Court that he be imprisoned in the

PENITENTIARY

of this State and kept at hard labor (No part of the time to be kept in solitary confinement), and until legally discharged. And that said imprisonment shall be for a period of duration not less than 1 to 20 Years (Forgery, 3 counts, 1, 3, and 5). 1 to 20 Years (Utering & Publishing, 3 counts, 2, 4, and 6) And that he pay the costs of this prosecution, taxed at $179.65 . . . . . .One Hundred Seventy-nine .65/100 . . . . . DOLLARS

I CERTIFY the above to be a true copy of said Judgment and Sentence.

Given under my hand and the seal of said Court, this 26th day of March . . . . . 1962.

C. FRANK SHERRARD
Clerk

By /s/ HELEN SHERMAN
Deputy

[SEAL]

[fol. W]

CERTIFIED COPY OF SENTENCE

114615

At a term of the Court of Common Pleas, begun and held at the Court House in Canton within and for the County of Stark, and State of Ohio, on the 26th day of March, A. D. 1962

Present, the Hon. Paul G. Weber . . . . Judge

In the Record and Proceedings of said Court, then and there had, among other things, is the following Judgment and Sentence, to-wit:

THE STATE OF OHIO	)	Indictment for BREAKING
vs	)	& ENTERING and GRAND
James Edward Brookhart	)	LARCENY

The said James Edward Brookhart having been found guilty by the Court.

It is therefore the sentence of the Court that he be imprisoned in the

PENITENTIARY

of this State and kept at hard labor (No part of the time to be kept in solitary confinement), and until legally discharged. And that said imprisonment shall be for a period of duration not less than 1 to 15 Years (Breaking & Entering) and 1 to 7 Years (Grand Larceny).

And that he pay the costs of this prosecution, taxed at $544.64

I CERTIFY the above to be a true copy of said judgment and Sentence.

Given under my hand and the seal of said Court, this 26th day of March 1962

C. FRANK SHERRARD
Clerk

By /s/ HELEN SHERMAN
Deputy

[fol. X]

[CERTIFICATE OF SERVICE (omitted in printing)]

[fol. Y]

IN THE COURT OF COMMON PLEAS

Stark County, Ohio

No. 18101 & 18139

STATE OF OHIO, PLAINTIFF

vs.

JAMES EDWARD BROOKHART, DEFENDANT

TRANSCRIPT OF PROCEEDINGS—March 23, 1962

Before the Hon. Paul G. Weber, Trial Judge

APPEARANCES:

ON BEHALF OF THE STATE OF OHIO:

Harry N. Kandel, Asst. Pros. Atty.
IRA G. TURPIN, Asst. Pros. Atty.

ON BEHALF OF THE DEFENDANT:

John Ergazos, Esq.,

OFFICIAL SHORTHAND REPORTER:

Elsie F. Pfeifer.

[fol. 1]

10:10 a.m.—FRIDAY—MARCH 23, 1962—
TRIED TO COURT:

THE COURT: There are two indictments, are you going to try them together?

MR. ERGAZOS: Yes, the defendant has signed a waiver of trial by jury and consented to be tried by the court.

THE COURT: Mr. Brookhart, will you come forward.

(Defendant approaches bench)

You have a right to a jury trial, do you understand?

A Yes, sir.

THE COURT: And in this case I understand you signed two waivers of trial by jury?

A Thats correct, Your Honor.

THE COURT: Is that your signature?

A Yes, it is, Your Honor.

COLLOQUY BETWEEN COURT AND COUNSEL

THE COURT: Case #18139?

A Yes, it is, Your Honor.

THE COURT: And on #18101?

A Yes, it is, Your Honor.

THE COURT: Let the record so show, and then let the record show that counsel for the defendant has agreed [fol. 2] to try, for the court to try the indictment #18101 and 18139 in the same trial.

MR. ERGAZOS: Thats correct, Your Honor.

THE COURT: Anything further?

MR. KANDEL: Nothing further.

MR. ERGAZOS: The only thing is, Your Honor, this matter is before the court on a prima facie case.

THE COURT: There being no . . . going to be no cross-examination of the witnesses, so the court will know and the State can't be taken by surprise, the court doesn't want to be fooled and have your client change his mind half way through the trial and really contest it, the State has a contest, we want to know in fairness to them so they can put on complete proof.

MR. ERGAZOS: I might say this, Your Honor, if there is any testimony adduced here this morning which leaves any question as to this defendant in connection [fol.3] with this crime I would like to reserve the right to cross-examine at that time.

THE COURT: That is raising another . . . that is putting the State on the spot and the court on the spot, I won't find him guilty if the evidence is substantial.

MR. ERGAZOS: We have a jury question in the court, undoubtedly there will be . . .

THE COURT: Ordinarily in a prima facie case . . . the prima facie case is where the defendant, not technically or legally, in effect admits his guilt and wants the State to prove it.

MR. ERGAZOS: That is correct.

THE COURT: And the court knowing that and the Prosecutor knowing that, instead of having a half a dozen witness on one point they only have one because they understand there will be no contest.

A I would like to point out in no way am I pleading [fol. 4] guilty to this charge.

THE COURT: If you want to stand trial we will give you a jury trial.

A I have been incarcerated now for the last eighteen months in the county jail.

THE COURT: You don't get credit for that.

A For over two months my nerves have been . . . I couldn't stand it out there any longer, I would like to be tried by this court.

THE COURT: Make up your mind whether you require a prima facie case or a complete trial of it.

MR. ERGAZOS: Prima facie, Your Honor, is all we are interested in.

THE COURT: All right.

MR. KANDEL: We waive the opening statements in this case. If it please the court, defense counsel having waived the necessity of having opening statements in this case I don't feel it is necessary for the State of Ohio. I would indicate the nature of the charge except for the [fol. 5] fact the indictments are on file charging this defendant with 4 counts of forgery, 4 counts of uttering and publishing, 1 count of grand larceny, and one count of breaking and entering, and that the State of Ohio will prove each and every material allegation necessary in those particular cases by witnesses.

THE COURT: There is no question the court will require that.

MR. KANDEL: I would like to call as my first witness Mr. Sam Macioce.

SAM MACIOCE, called to maintain the issue on behalf of the State of Ohio, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION BY MR. KANDEL:

Q Tell us your name, sir?
A Sam Macioce.
Q Where are you employed?
A Kroger Co., in Massillon.

MR. KANDEL: This will be on #18139.

[fol. 6] THE COURT: Yes, that is the order I want to set up here.

MR. KANDEL:

Q Mr. Macioce, what is your occupation, sir?
A Store manager.
Q Going back to October 8th in the year 1960, I will ask you if you had a check cashed in your store purportedly made out to one Jimmy Cox?
A Yes, sir.

(State's Ex. "A", marked)

Q Showing you State's Ex. "A", will you tell me if you have seen this particular check before, sir?
A Yes, I have and this is the . . .

MR. ERGAZOS: OBJECTING now to any testimony in regard to this check for the reason.

THE COURT: Are you trying the case on the merits or just want the State to make a prima facie case?

MR. KANDEL: At this time the State moves to amend the indictment for the simple reason there has been a typographical error in Check #361. I believe [fol. 7] this is what the defense counsel is getting at and I have noticed it myself.

THE COURT: That is a different matter. What is the motion of the Prosecutor?

MR. KANDEL: The question of numbering on these checks. If it please the Court, the indictment shows that each of these checks has the number of 364. When the typing staff wrote up the indictment check #367 . . .

THE COURT: I don't think that even is necessary.

MR. KANDEL: But this is what I was going to move.

THE COURT: The instrument is a forgery, not what it is marked, but if you want to clarify something that may be done.

MR. KANDEL: #374, #361, and the fourth is #364. I would like to amend the indictment to have the numbers correspond which I have given to the court.

MR. ERGAZOS: Is #361 the first count?

[fol. 8] MR. KANDEL: I don't think it makes any difference, it was all done on the same day. They can be taken in any order you desire.

THE COURT: Are all the same amount?

MR. KANDEL: No.

MR. ERGAZOS: That is the reason for the objection.

THE COURT: Lets take one check at a time.

Was this pertaining to the first count?

MR. KANDEL: This is the Beacon Boxes check in the amount of $57.58.

THE COURT: $57.58?

MR. KANDEL: Yes, Your Honor, the check is listed here as $57.82. I would like to amend the indictment to the amount of $57.58, and make it check #361, in the first count in this indictment.

MR. ERGAZOS: OBJECT to the motion, Your Honor.

THE COURT: You object?

MR. ERGAZOS: That motion foi the amendment, to the amendment at this time.

[fol. 9] THE COURT: Let the record show that as far as the law is concerned it doesn't matter what the amount is, or what the number of the check is, it is just a question, whatever the amount of the check, whether it is a forgery or not, and the jury would be so instructed if you had a jury trial, but to clarify this the Court will allow you to amend check #361.

MR. ERGAZOS: Is that on the first count?

MR. KANDEL: $57.58 on count No. 1.

THE COURT: That is just to clarify it.

MR. KANDEL: Thank you, Your Honor.

Q I will ask you if you cashed this particular check?

A It was either me or my co-manager cashed it.

Q In any event, did it pass through your particular store?

A No, sir, it passed through my store because I cashed it.

Q That is what I am talking about.
A Yes, it did.
[fol. 10] Q Did the check return to your store?
A Yes, it did.
Q I will ask you for what reason was it returned?
A Stolen checks with the name forged on them.
THE COURT: The reason for returning them wouldn't make any difference no matter what the bank called it. You are not sure whether it is forged, was it passed, or wasn't it.

MR. KANDEL:

Q In any event, this check did come back to you and you turned it over to the sheriff's department?
A Yes, sir.
MR. KANDEL: I believe thats all. I have one more question.
Q Was this done on or about the 8th of October 1960?
A Yes, sir, it was a Monday or Tuesday evening.
THE COURT: Where?
A At Krogers.

MR. KANDEL:

Q That is at the Kroger Store in Massillon where you are employed?
A Yes, sir.
[fol. 11] Q That is in Stark County?
A Yes, sir.
THE COURT: What store was that again?
MR. KANDEL: Kroger.
I believe that is all, Your Honor.
THE COURT: You are excused.

MR. KANDEL: If the Court please, I would like to amend the indictment in count No. 3 to show the number of the check to be 367 instead of 364.
MR. ERGAZOS: We OBJECT, Your Honor.

(State's Ex. "B", marked)

THE COURT: Anything else?

MR. KANDEL: That is all that is necessary in this particular one.

THE COURT: The Court, for the purpose of clarity, not as to any material charge. I say that Mr. Ergazos for the reason that the number of the check has nothing to do with a forgery, I believe you will agree.

[fol. 12] MR. KANDEL: If it please the Court, I would like to also have the indictment amended in the count No. 5 and make that check #374.

MR. ERGAZOS: Again OBJECT to the motion.

THE COURT: OVERRULED.

MR. KANDEL: And the amount of the check to $72.63.

MR. ERGAZOS: Again OBJECT.

THE COURT: $72.63. OVERRULED. It may be so amended.

MR. KANDEL: If the Court please, I would like to call for my next witness Doris Brookhart, Doris Jones.

DORIS JONES, called to maintain the issue on behalf of the State of Ohio, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION BY MR. KANDEL:

Q Will you state your name to the court?

A Doris Jones.

Q Where do you live?

[fol. 13] A 1022 - 3rd, S. W.

Q I will ask you if you know a man by the name of James L. Brookhart?

A Yes, I do.

Q Do you see him in the courtroom?

A Yes, I do.

Q Point him out to the court please?

THE COURT: How is he dressed?

A Hes got a coat on, light blue shirt and dark pants.

THE COURT: Let the record show she identifies the defendant.

MR. KANDEL:

Q Going back to the month of October 1960, I will ask you if you were in the company of Mr. Brookhart and another man during that month?

A Yes, I was.

Q Going back . . . first of all, who was the other man?

A Ronald Mitchell.

Q Do you know where Mr. Mitchell is at the present time?

A Yes, sir.

Q Where is he?

A State Reformatory or Penitentiary.

Q I will ask you if that is based on the charges, to [fol. 14] your knowledge, that were placed against him and Mr. Brookhart?

A Yes, sir, I was in the courtroom the day he was sentenced.

Q Now I will ask you if you did not plead guilty in Case No. 18139 to the charges of forgery and uttering and publishing?

A Yes, sir.

Q Showing you checks . . .

(State's Ex. "C" and "D" marked)

THE COURT: But you also have been known as Doris May Brookhart?

A Yes, sir.

MR. KANDEL:

Q Now did you live with Mr. Brookhart for a period of time?

A Yes, sir.

Q And I will ask you if during that period of time you had conversations with him concerning certain checks?

A I wouldn't say exactly conversations with him, there was talk between him and Mitchell, there was talking between him and Mitchell, not all three of us.

Q What was this conversation about?

[fol. 15] A They were talking about forging checks and cashing them.

Q Did they in their conversations and this talking with you tell you what type of checks, or whose checks they were?

A You mean prior to the time the checks were . . .

Q Yes.

A They had pay roll checks but they didn't say who they would be on.

Q Did you observe anything other than checks? By that I mean any mechanical equipment for writing checks?

A At the time they did it, yes, they put the check portion in the check writing machine.

Q Did you at any time have a conversation with Mr. Brookhart concerning where he obtained this particular item?

A I knew some checks he got from where he stole the checks from.

Q Where was that?

A Beacon Box Company.

Q Did you question Mr. Brookhart and Mr. Mitchell in the presence of each other when they had obtained these, or who got them.

[fol. 16] A I knew when they obtained it, when they come back in they had it.

Q I will ask you if this conversation was held prior to their going out and when they returned with certain items?

A Well, they went out and there was only just a vague conversation about checks. When they came back they had a check writer and checks.

Q I will ask you if this check writer was used later by you and Mr. Mitchell and Mr. Brookhart?

A Yes, sir.

Q What was done with the check writer?

A You mean after we were finished using it? I don't know, they took it out and thats the last I saw it.

Q Did you write any checks?

A Yes, I did.

Q How many?

A I couldn't say how many. I think its around 20.

Q Who signed the name on the checks?

A I did.

Q And who signed the name of the individual supposed to be the officer of the company?

A I did.

[fol. 17] Q Why did you sign it?

A Well . . . you mean why it was me and not the other ones?

Q Yes.

A Because I had better handwriting.

THE COURT: Who was present when you signed these checks?

A Mr. Brookhart, Mr. Mitchell and my daughter.

MR. KANDEL:

Q How old is your daughter?

A My daughter was then six years old.

Q Where did the writing of these checks take place?

A Hilltop Motel on Route 62.

Q After the checks were written what happened to the checks?

A I presume they were cashed, they came back with money.

Q I will ask you if the checks were given to either Mr. Brookhart or Mr. Mitchell?

A They both had them.

Q Did they leave after the checks were written?

A Yes.

Q Did they later return?

A Yes.

[fol. 18] Q After they returned did you observe any cash in the presence of either Mr. Mitchell or Mr. Brookhart?

A Yes, sir.

Q Had they had this amount of money prior to taking the checks and leaving?

A No, sir, not that much.

THE COURT: Was anything said by them pertaining to them in your presence?

A Not pertaining to the cash. I mean they said they had cashed them.

MR. KANDEL:

Q You were not along when they were cashed?
A No, sir.
THE COURT: Do you remember about how many checks there were?
A I am not positive. There were around 20, but I am not positive.
MR. ERGAZOS: I can't hear.
A I think around 20, but there could be more.

MR. KANDEL:

Q Did you obtain any money from these checks?
A Not directly, no.
Q Explain yourself, what do you mean by, not directly, no?
[fol. 19] A There wasn't any directly given to me. We went from there to New York and took a trip and I presume that money paid for it.
Q Who is "we"?
A Mr. Brookhart, Mr. Mitchell and my daughter and me went to New York.
Q Did you go in the same automobile?
A Yes.
Q Whose automobile was it?
A Mr. Brookhart's.
THE COURT: This was after the checks were cashed?
A Yes.

MR. KANDEL:

Q What happened in New York as far as Mr. Mitchell was concerned?
A We left Mr. Mitchell there.
Q Did you continue on your trip with Mr. Brookhart?
A Yes, sir.
Q Was your daughter along?
A Yes, sir.
Q Where did you go?
A We went to Washington, D. C., and then to Miami, Florida.

[fol. 20] Q You went to Washington, D. C., and then to Miami, Florida. How long did you remain in Miami, Florida?

A About 6 months

Q Did you remain all that time with Mr. Brookhart?

A No, sir.

Q What happened?

A Well, I left him. The last day was October 30th.

Q And I believe later you were extradited back to the State of Ohio?

A Yes, sir.

Q And then you entered a plea of guilty on these charges, is that right?

A Yes, sir.

THE COURT: I believe your plea of guilty was before this court?

A Yes, sir.

THE COURT: Did this court or the prosecutor or anybody promise you any leniency or any benefits of any kind?

A No, sir.

MR. KANDEL:

Q I want to show you State's Ex. "A", check #361, do you recognize the handwriting on that check?

[fol. 21] A On top? Yes,

Q Turning it over, do you recognize the handwriting purportedly of Jimmie Cox?

A Yes, sir.

Q And whose is that?

A Mr. Brookhart.

Q Mr. Brookhart. Will you take a look at State's Ex. "D". Have you ever seen that before?

A Yes, sir.

Q I will ask you if you wrote that check?

A Yes, sir.

Q And will you look at the back of that?

THE COURT: Before you answer that . . . which was the one you just asked her about?

MR. KANDEL: #361.

THE COURT: 361.

MR. KANDEL: Yes, Your honor.
THE COURT: The next one, the one she has now is 374 . . . no.
MR. KANDEL: This one, if the Court please, is 367.
THE COURT: Yes, 367. All right, she may answer.

[fol. 22] MR. KANDEL:

Q Do you recognize the writing on the back?
A It looks like Mr. Brookhart's.
Q Showing you State's Ex. "C", check No. 374, I will ask you if you wrote that particular check?
MR. ERGAZOS: OBJECT.
THE COURT: This is which one now?
MR. KANDEL: 374.
MR. ERGAZOS: OBJECT, Your Honor, to the reference here now, because for the reason that the indictment fails to show the name of any payee on the check, on that particular check.
THE COURT: The checks . . . you called the check 374, you ought to use the number of the exhibit.
MR. KANDEL: I have, Your Honor, State's Ex. "C", which was check 374.
THE COURT: What was your objection?
MR. ERGAZOS: My objection was as to any reference to this particular exhibit for the reason the indictment fails to show any . . . the name of any payee whatsoever.
[fol. 23] MR. KANDEL: The indictment fails to show that?
MR. ERGAZOS: That's right.
MR. KANDEL: The check number has been amended, I have the check here, it's here before the court.
THE COURT: How do you mean, probably I got it wrong. The first one she testified to is 361.
MR. KANDEL: Yes, Your Honor, the first she testified was 361.
THE COURT: That is exhibit. . . .
MR. KANDEL: "A".
THE COURT: Exhibit "A" was, that is the first one she testified to.
MR. KANDEL: All right.

THE COURT: The second one is exhibit . . .

MR. KANDEL: 307, Exhibit "B", which is counts three and four, on count No. 5 is 374.

THE COURT: That is Exhibit "C".

MR. KANDEL: And he is saying on the . . . his particular copy of the indictment does not have the name [fol. 24] of the payee. However, on the original indictment it shows the payee.

MR. ERGAZOS: Let the record indicate an OBJECTION to this reference because of the fact not being on the copy served upon the defendant, Your Honor. That was completely blank.

THE COURT: Let the record show the original indictment in court presently shows the name of the payee as Jimmie Cox.

MR. KANDEL:

Q Let me ask you, do you know anyone who used the name of Jimmie Cox?

A Yes, sir, I know a boy by that name.

MR. ERGAZOS: Your Honor, a further OBJECTION now because of that particular one being made out to James Brookhart is . . . again is a variance with the indictment, with the original, although the copy did not show any payee whatsoever.

THE COURT: Whoever made this up certainly made [fol. 25] some blunders, the court can emphatically say they are not material and can't be amended. In all cases whether a matter of forgery, the instrument was forgery, the description incidently . . . but the description should be corrected . . . at least explained for identification purposes. Now, this is the exhibit . . .

MR. KANDEL: "C", Your Honor.

THE COURT: That is the fifth count?

MR. KANDEL: Yes, Your Honor.

THE COURT: Now comes this question of identification.

MR. KANDEL: If the Court please, may I question my witness a little farther concerning the use of the name?

THE COURT: Yes.

MR. KANDEL:

Q You say you know a man by the name of Jimmie Cox?

A He went by another exactly like it.

Q Yes. Did you have a conversation with Mr. Brook-
[fol. 26] hart about Jimmie Cox and putting of the name Jimmie Cox as the payee on these checks?

A Not exactly, because he had a driver's license and identical name, Jimmie Cox.

Q Who is he that had the identical name?

A He is a boy we met while working in a carnival some place here in Ohio.

Q Did Mr. Brookhart ever have any identification of Jimmie Cox on his person?

A Yes, sir.

Q Did Mr. Brookhart to your knowledge, ever pass himself off as Jimmie Cox?

A Not especially. In the case of the checks I presume he passed himself off.

Q I will ask you, on your examination of State's Ex. "A", the name of Jimmie Cox on the back was written by Mr. Brookhart?

A I think it was, but I am not positive.

Q I will ask you have ever seen Mr. Brookhart's writing before?

A Yes, sir.

Q I will ask you if this is as you recall his writing?

A No, it is not exactly like his writing.

[fol. 27] Q When you made these checks out to Jimmie Cox was Jimmie Cox present?

A The real Jimmie Cox?

Q Yes.

A No.

Q To your knowledge was he ever present?

A No.

THE COURT: As I understand you now, you say . . . did I understand you to say the defendant here had possession of identifications of Jimmie Cox?

A Yes, he did.

THE COURT: What did the identification include?

A I know there was a driver's license and there was some other cards, but I am not sure what they were.

THE COURT: Do you know how the defendant obtained them?

A Yes, I do. Jimmie Cox gave them to him.

THE COURT: Coming back to this, the indictment, I will allow her testimony on it and take that under consideration. You object?

MR. ERGAZOS: OBJECT.

[fol. 28] THE COURT: If it isn't, of course, the signature isn't sufficient then, of course, as far as that is concerned the defendant could be reindicted if he wants to be, or the prosecutor I mean, so desires, but I will reserve the question on this objection at this time.

MR. KANDEL:

Q You stated, I believe, that you feel there were other checks in number possibly 20?

A Yes.

Q I have a copy of a check here which is marked State's Ex. "D", do you recall a check as No. 364, that you made out?

A I don't recall any of the numbers.

Q These checks you obtained and made out were they in sheets or were they individual checks?

A No, they were in sheets.

THE COURT: Has she identified the signature on that?

MR. KANDEL: Not as yet.

THE COURT: Exhibit "C".

[fol. 29] MR. KANDEL:

Q Going back to State's Ex. "C", did you write the name . . .

A Yes, sir.

Q . . . that is on the bottom of that check?

A Yes, sir.

Q And who put the name James Brookhart on there?

A I did.

Q Was James Brookhart present when the check was signed?

A Yes, sir.

Q Did he see you place the name of R. J. Buchannon on it?

A Yes, sir.

Q Who told you to place that name on there?

A Actually nobody gave it to me, nobody knew the treasurer's name so I thought up one.

Q I will ask you, was Mr. Brookhart present when this name was thought up?

A Yes, sir.

Q And was Mr. Mitchell present when that name was thought up?

A Yes, sir.

Q And at the time of the writing of all the checks, [fol. 30] the number you stated was written, was Mr. Brookhart and Mr. Mitchell present?

A Yes, sir.

Q Were they at all times during the writing of all these checks?

A Yes, sir.

Q Were they present during the time the conversation was held with you, that is, Mr. Mitchell present during the time the conversation was held concerning the breaking, or where they had gotten these checks?

A Well, yes, sir.

Q Now showing you the particular . . . State's Ex. "C", there is a signature there and purportedly James Brookhart's. Is that his signature?

A Yes, definitely.

Q That is Mr. Brookhart's signature?

A Yes, it is.

Q I will ask you whether or not during any of the travels you were present when Mr. Brookhart used the name of Jimmie Cox with this identification he had?

A Well, I don't know whether he signed it in motels and things, he might have signed that name, because [fol. 31] I never signed the register.

Q I will ask you if you recall at the time of making a check in the amount purported here on State's Ex. "D"?

A No, I don't recall making the check. I don't recall what the number was but I didn't make that check.

Q These writings on here are not your handwriting?

A No.

Q Now you tell us if you will please, whether these checks that you saw, when you first saw them? I believe you said they were in sheets, is that correct?

A Yes.

Q Do you recall how many were on a sheet?

A No, sir, I don't.

Q Do you recall whether the numbers were consecutive; that is, running one right after another, like torn out of a book, with the numbers running one right after another?

A Yes, sir.

Q And the lowest number we have here is what, as far as the number of the check?

A It would be this one.

Q And is that is State's Ex. "A", bearing number 361, is that right?

[fol. 32] A Yes, sir.

Q And the next lowest number then is what?

A This one.

Q You have placed them in order here numerically, showing State's Ex. "A", 361; State's Ex. "D", 364. Which is the copy of a check?

THE COURT: State's Ex. "B".

MR. KANDEL: "B", is 367.

THE COURT: All right, "C"?

MR. KANDEL:

Q And then State's Ex. "B", which is 367 on the check; and State's Ex. "C", which is 374.

THE COURT: State's Ex. "D"?

MR. KANDEL: Copy of a check, check 364.

THE COURT: Its testified here to "D".

MR. KANDEL: Its testified this is a copy of a check. She doesn't remember, this is not her writing, this is a copy of a check, it was in numerical sequence.

THE COURT: So there is no misunderstanding Exhibit "D", the original will be produced?

[fol. 33] MR. KANDEL: Yes, Your Honor.
THE COURT: All right.

MOTION FOR ADMISSION OF EXHIBITS AND OBJECTIONS THERETO

MR. KANDEL: I believe that is all, you may inquire. "A", "B", and "C", we move for their admission.
MR. ERGAZOS: We OBJECT to the admission of "C".
THE COURT: That the court will take under consideration.
MR. KANDEL: We move at this time to amend the indictment to show, indicate upon the face of the indictment "also known as James Brookhart, also known as Jimmie Cox, also known as. . ."
MR. ERGAZOS: OBJECT.
MR. KANDEL: "James Brookhart".
THE COURT: No, that would be overruled. Your motion, as I get it, your motion is intended to change count 5, from Jimmie Cox . . . "pay to the order" instead of Jimmie Cox, James Brookhart?
MR. KANDEL: No leave as to Jimmie Cox, change to James Brookhart also known as Jimmie Cox, but [fol. 34] adding in count 5 or in the heading of the indictment, either one, the identification "but also known as Jimmie Cox".
THE COURT: OVERRULED. You can't amend that, this check is made out, you can't change the check, it is made out to James Brookhart, you can't substitute any other name for that.
MR. ERGAZOS: Are you still sustaining my objection?
THE COURT: Yes, the motion would have to be amend the indictment to read instead of Jimmie Cox, instead of James Brookhart.
MR. KANDEL: I so move to amend that.
MR. ERGAZOS: OBJECT.
THE COURT: I will take it under consideration. Yes, we might have some law on that later.

(State's Ex. "E", marked)

MR. KANDEL: If it please the Court, Mildred Haag took a statement off of the other defendant, Ronald Mitchell and I believe there has been shown here a con-[fol. 35] spiracy which would permit this into evidence and I have it marked as State's Ex. "E". I have this and I have called Miss Haag to come in and testify as to her taking . . . I observe Mildred Haag's signature here at the bottom of the statement and I recognize this as her statement. I was also present at the time of taking the statement. Now . . .

THE COURT: Is Mildred Haag here?

MR. KANDEL: No, she is not.

THE COURT: Do you want to step into chambers and we will discuss this a moment.

MR. KANDEL: If the Court please, do you want me to identify under oath concerning taking of this statement or Mildred Haag. I was present.

THE COURT: You are offering . . .

MR. KANDEL: Yes, sir, I am offering the statement of the co-conspirator.

[fol. 36] THE COURT: Are you objecting to it?

MR. ERGAZOS: I OBJECT to the introduction of State's Ex. "E", for the reason that the party giving the statement is in the Mansfield Reformatory and his whereabouts are known to the prosecution and it is possible for the prosecutor to produce that witness rather than introducing that statement.

THE COURT: But you are not denying the statement.

MR. ERGAZOS: No we are not denying the statement but we are objecting to the introduction of it at this time.

THE COURT: OVERRULED.

MR. ERGAZOS: EXCEPTIONS.

MR. KANDEL: I would like to now, to introduce it, if the Court please, its been accepted into evidence?

THE COURT: Yes, its been accepted.

[fol. 37] DALE RATLIFF, called to maintain the issue on behalf of the State of Ohio, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION BY MR. KANDEL:

Q Will you tell us your name please?
A Dale Ratliff.
Q Mr. Ratliff, where do you live?
A 1802 - 49th St. N. W.
Q And what is your occupation?
A Manager, Redhead Oil Co.
Q Do you know a man by the name of James Brookhart?
A Yes, I do.
Q Do you see him in the courtroom?
A Yes, I do.
Q Point him out to the court please? Let the record show the witness pointed to the defendant and defendant waved to him acknowledging his identity. I will ask you if the defendant ever worked for you?
A Yes, he did.
Q During that time did he ever present a check purportedly made out to him and was cashed at your place of business?
A Not while he was working for us, no.
[fol. 38] Q Did he at a later date present a check that was cashed which later came back as a forgery or for some other reason?
A Thats correct.
Q Handing you State's Ex. "C", will you look at this, sir. Do you recognize that?
A Yes, I do.
Q I will ask you if this is the check that was cashed at your place of business?
A Yes.
Q And did Mr. Brookhart cash that check, sir?
A Yes, he did
Q Now how long did he work for you, Mr. Ratliff?
A I don't have the work records, I would say about six months.

Q During that time did you get to know Doris also?
A Yes.
Q And I will ask you how you got to know her?
A Well, she used to bring him to work and pick him up occasionally.
Q Did he ever have a conversation with you about her being his wife or living with her?
A I don't know whether he did or not. I just took for granted that she was.
[fol. 39] Q Your place of business is in Canton, Ohio, Stark County, is it not?
A Yes, sir.
MR. KANDEL: I believe thats all.

MARGARET DE GORDON, called to maintain the issue on behalf of the State of Ohio, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION BY MR. KANDEL:

Q Will you state your name please?
A Margaret De Gordon.
Q Is that Mrs. De Gordon?
A Yes, it is.
Q Where do you live?
A 814 - 17th St., S., Massillon.
Q What is your occupation?
A Head cashier at Loblaw's.
Q Is that the store at 4438 West Tusc. St.?
A Yes, it is.
Q Going back to the year 1960, in October, were you their head cashier?
[fol. 40] A Yes, sir.
Q Was it your duty to check all . . .
THE COURT: What was that store?
MR. KANDEL: Loblaw's, 4428 West. Tusc.
Q . . . check all people that presented for cashing or . . .
A Yes.
Q . . . checks and things of that nature?
A Yes.

Q Showing you State's Ex. "B", I will ask you if this particular check passed through your hands?

A Yes, it did.

Q Do you know who passed that check to you?

A I think I do.

Q Do you see that person in the courtroom at the present time?

A Yes.

Q Will you point him out to the court if you see him?

A (pointing)

THE COURT: How is he dressed?

A Light blue shirt.

MR. KANDEL: Let the record show the witness identifies the defendant.

THE COURT: It may so show.

[fol. 41] MR. KANDEL:

Q On the back of State's Ex. "B", there is a name Jimmie Cox, and an address and license number, driver's license number and social security number and auto license number, the name Nash '58 and some initials, signature on the bottom. Will you tell me who put everything . . . put the name Jimmie Cox on there?

A I did.

Q And where did you get that information?

A From the papers he showed me and also from the card.

Q And this was a 1958 Nash automobile with license number P-1987-T, or J?

A That is a J.

Q And this information concerning the name Jimmie Cox and the man who claimed to be Jimmie Cox and gave you that information is the man you pointed out back here. is that correct?

A Yes.

Q This place of business where you work is in Stark County, is it not?

A Yes, it is.

MR. KANDEL: Thank you, I have no further questions.

[fol. 42] RICHARD BARNHART, called to maintain the issue on behalf of the State of Ohio, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION BY MR. KANDEL:

Q Will you state your name please?

A Richard Barnhart.

Q Mr. Barnhart, you are one of the deputy sheriffs of Stark County?

A Yes.

Q Going back to the 10th of October 1960, or thereabouts, were you connected with an investigation of a breaking and entering of the Beacon Box, Inc., in Perry Heights?

A Yes, sir, I was.

Q I will ask you, 151 Lennox, S. W., Perry Heights is in Stark County, Ohio?

A Yes, sir.

Q Tell us how entry was made?

A Entry was made into the building through a window on the west side of the building.

Q When you arrived did you find anything that was missing, to your knowledge?

A On the original contact there was a check writer [fol. 43] missing.

THE COURT: Going back to the window, what did you see, what did you notice?

A The window was not damaged in any way, but had been raised and then again lowered when they left. Now there are two business establishments in the same building and entry was made into more or less of a showroom; they went through that room to the Beacon Box office and door to that office was forced open.

THE COURT: By force, how do you mean?

A The door had been locked, to was jimmied or . . .

THE COURT: You saw it?

A Yes, sir.

MR. KANDEL:

Q Now, sir, after this did you talk to one Ronald Keith Mitchell?

A Sometime later, yes, sir.

Q And I will ask you if you were not present on February 3, 1961, when State's Ex. "E", was taken from Mr. Ronald Keith Mitchell?

A Yes, sir, I was present.

Q And I will ask you if during that time he men-
[fol. 44] tioned a man by the name of James Brookhart?

MR. ERGAZOS: OBJECT.

THE COURT: He, who?

MR. KANDEL: Mitchell.

THE COURT: Well, that has been admitted, SUSTAINED.

MR. KANDEL:

Q Have you talked to a man by the name of James Brookhart?

A Yes, sir.

Q Did you have a conversation with him relative to the breaking and entering of the Beacon Box Co.?

A Yes, sir, I talked to him about it.

Q What did he tell you?

A He denied any part of it, sir.

Q Did you question him about the forgery with which he was charged on the checks?

A Yes, sir, I talked to him in reference to this case.

Q What did he tell you?

A Stated at that time he did not wish to make a statement. He would wait until he could confer with an attorney.

Q Did he deny at that time deny forging these checks to you?

[fol. 45] A No, sir.

Q But he did deny breaking into this Company?

A Yes, sir.

Q Did you question him concerning the check writer that was missing?

A No, sir, I did not.

MR. KANDEL: I believe thats all.

JAMES A. BAILEY, called to maintain the issue on behalf of the State of Ohio, being first duly sworn by the Court, testified as follows:

DIRECT EXAMINATION BY MR. KANDEL:

Q Will you tell us your name, sir?
A James A. Bailey.
Q Mr. Bailey, where do you live?
A Mount Eaton.
Q And what is your occupation, sir?
A Presently, or then?
THE COURT: Then.
A I was president of the Beacon Box, Inc.

MR. KANDEL:

Q And where did you have your place of business, sir?
[fol. 46] A 151 Lennox Ave., in Perry Heights.
Q Who owned the building where that is located?
A R. & S. Enterprises.
THE COURT: Where is that located, what county?
A It is in Stark County.

MR. KANDEL:

Q Going back to about the 10th of October, 1960, did you go to your place of business on the morning of the 10th and observe anything about it different than what you had noticed earlier?
A I noticed the door between our part of the building and that occupied by Liberty Trailer had been damaged and forced open.
Q Was this a door that was locked at all times when you were not there?
A Yes, sir.
Q From the outside do you know how they got into the inside of the building?
A Apparently they came through a window in the Liberty Trailer part of the building.
Q But the door into your office was broken into, is that right?

A The door into our portion of the building, the door [fol. 47] to the office itself, was not locked.

Q Now, did you find anything missing?

A Yes, I noticed the check writer was missing and later on some of our pay roll checks.

Q Do you recall what numbers of the pay roll checks that were missing had on their face? By this, I mean the checks you had a specific number on each check, did you not?

A Yes.

Q I will ask you if you remember at this time the number of the checks that were missing?

A I believe there were 33 checks missing.

Q I will ask you if you were missing checks #348 through #382 out of this particular checkbook?

A That should have been looked up before I came in.

Q I will ask you if you gave such a report to the police, the numbers that were missing?

A Yes, I did.

Q And if the record reveals it was #348 through #382 that would be what you observed back on October of 1961?

A Thats right, that is what I reported to the deputy sheriffs.

[fol. 48] Q I am showing you State's Ex. "A", sir, check #361, I will ask you if you ever wrote such a check?

A No, sir.

Q Who was the treasurer of your company?

A I was also president and treasurer.

Q Who was the only one authorized to sign checks for your company?

A My signature was the only one authorized.

Q Do you know Ronald J. Mitchell?

A No, sir.

Q Had he anything to do with the Beacon Box, Inc.?

A No, sir.

Q Showing you State's Ex. "D", . . . incidently, on State's Ex. "A", do you know a Jimmie Cox?

A No.

Q Showing you State's Ex. "B", will you tell me whether you have ever seen that check before as in that condition, written out?

A I looked at one check when Mitchell was tried, this may have been the one, at least it may be the same one.

Q I will ask you if you made this check out, sir?

A No.

Q Did you sign the name of Buchanan on that check?

[fol. 49] A No, sir.

Q Was anyone by that name authorized to sign check #367, which is State's Ex. "B"?

A No, sir.

Q Showing you State's Ex. "C", which is another check did you make that check out?

A No, sir.

Q Do you know a R. J. Buchannon?

A Heard of him since then.

Q Did you at that time know a James Brookhart?

A No, sir.

Q Did you write a check to James Brookhart?

A No, sir.

Q Did you owe any money to Mr. Brookhart?

A No, sir.

Q I will ask you if you made out State's Ex. "C", which is check #374?

A No, sir.

Q I will ask you whether or not more of the checks had come back, which have been destroyed by the bank, to your knowledge?

A You would have to check with the bank.

Q Showing you a copy of check #364, which is [fol. 50] marked State's Ex. "D", I will ask you if this is the same type of check that you had with the name of Beacon Box, Inc., the date and other pertinent data, including a check number on it, #364, did you have such a check in your possession prior to October 10, 1960?

A It appears the same as this one.

Q I will ask you if this #364 was also included in the checks that were missing, that you gave to the police, Numbers 348 through 382?

A It is included in that group.

THE COURT: I want to ask, do the other identifications appear on the printed forms on these exhibits "A", "B", "C" and "D"?

A Yes, sir, they are the same as the rest of my checks.

THE COURT: Can you say whether or not those were your checks?

A They are.

MR. KANDEL:

Q I will ask you if State's Ex. "D", is a copy of the blank checks, not as filled out, but as a blank check?

[fol. 51] A As far as I can tell.

THE COURT: Does it appear to be the identical form?

A To me it appears to be.

MR. KANDEL:

Q Incidentally, do you know a man by the name of Ronald Mitchell?

A Yes, sir.

Q Did he formerly work for you?

A Yes, he did.

MR. KANDEL: I believe thats all.

MR. KANDEL: I would like at this time to recall Doris back to the stand.

MR. ERGAZOS: OBJECT, to the recall, Your Honor.

THE COURT: OVERRULED. I am not doing any of this Mr. Ergazos because of the waiver of a jury. In fact, if this were an attempt to rebuttal it would have to be limited to rebuttal, so I would allow you . . .

[fol. 52] DIRECT EXAMINATION OF DORIS JONES BY MR. KANDEL:

MR. KANDEL:

Q When you were on the stand earlier I did not ask whether or not you know the kind of automobile that Mr. Brookhart had?

A Yes, I do.
Q What kind was it?
A Its a Nash, I am not sure about the year but it was one of the later Nash's, one of the latest models.
Q Did you know the license number of that automobile?
A Yes.
Q What was it?
A P-1987-J.
MR. KANDEL: I believe thats all.

(State's Ex. "F", marked)

MR. KANDEL: I have seen a piece of correspondence, if it please the Court, one written by the defendant James Brookhart, mailed to the office of the Prosecuting Attorney of Stark County, and a copy of the answer sent by Mr. Ira G. Turpin from our office, in reference to [fol. 53] this particular matter as an admission against him.
THE COURT: Have you seen it?
MR. ERGAZOS: I have seen them, we have no objection.
THE COURT: Are you offering it?
MR. KANDEL: Yes, Your Honor.
THE COURT: Then I will read it and see . . .
MR. KANDEL: If it please the Court, at this point I am waiting only for the check from Massillon to be brought over and rather than detain the court . . .
THE COURT: Yes, we can recess. You introduced this for what purpose?
MR. KANDEL: To show . . .
THE COURT: His incarceration?
MR. KANDEL: To show his attitude upon the charges placed against him here and can be accepted as admission against interest as far as this man is concerned.
THE COURT: Well, there is evidence in this case [fol. 54] already of flight. This indicates that he . . . if you are introducing it to substantiate flight, or if you are introducing it to support he is in a federal prison . . .

MR. KANDEL: I think there are several matters there you could go to. I think the wording is indicative of the fact he knows he is guilty of this as he makes an admission in this particular statement. He is requesting we do something to get rid of the charges against him even though . . .

THE COURT: Have you read between the lines? I find nothing here as an admission? The court could take . . . he states he learned his lesson, he never would be in trouble again, but he doesn't make any admission. No, objection SUSTAINED.

MR. ERGOZAS: We OBJECT, Your Honor, to a [fol. 55] continuance for the purpose of presenting further evidence. The Prosecutor's office notified me on Monday and Tuesday of this week . . .

THE COURT: That is true.

MR. ERGAZOS: And they had ample time to ascertain if this evidence was going to be available and we claim we are entitled to proceed immediately or terminate the trial at this point.

THE COURT: This witness is not obtainable and he has the check. If the court felt he had skipped in order not to testify why, I, of course, wouldn't continue it. Lets see, that is as . . .

MR, KANDEL: Yes, as to two counts.

THE COURT: No other witness testified as to "D" except Doris Jones.

MR. KANDEL: Yes, Your Honor, except only of the place of business.

THE COURT: Oh, yes, Bailey says it looked like it. [fol. 56] MR. KANDEL: And there was one check number in the series that was missing.

THE COURT: There has been no testimony as to the grand larceny count except that some checks . . . a check may have been . . . was taken.

MR. KANDEL: I would like to recall Mr. Barnhart.

THE COURT: Or the owner.

MR. KANDEL: The owner has left.

THE COURT: I couldn't accept this witness.

MR. KANDEL: As to his checking into the matter and finding out the value of it.

THE COURT: He can testify to the value but what was taken . . .

MR. KANDEL: The check writer, he testified to that was taken.

THE COURT: I am limiting you to the check writer.

DIRECT EXAMINATION OF R. BARNHART
BY MR. KANDEL:

Q Mr. Barnhart, I believe you testified that a check writer was missing, so did Mr. Bailey, the owner of the [fol. 57] business establishment. I will ask you if you made an investigation as to the condition of the check writer and the age of it and the approximate cost of this check writer and replacement of it?

A I did. I talked to Mr. Bailey in reference to the check writer. He did purchase it outright and he placed the value of it at $90.00.

THE COURT: Now if there is an objection to that . . .

MR. ERGAZOS: OBJECT, Your Honor.

THE COURT: Then I will grant . . .

MR. ERGAZOS: It is hearsay.

THE COURT: SUSTAINED. I will give the prosecution time to bring the owner back. We will continue the case for that until 1:00 o'clock and then that will give you time to get the grand larceny check and I will talk over with the attorneys in chambers about this one and about this one, of Exhibit "C".

11:45 a.m.
RECESS

[fol. 58] 1:15 p.m.—COURT IN SESSION:

CONTD. DIRECT EXAMINATION OF
JAMES A. BAILEY BY MR. KANDEL:

Q You testified this morning about your place being broken into and a check writer being missing. What was the value of that check writer, sir?

A I valued it . . . I think at the time . . .

THE COURT: Not what you valued it.

MR. KANDEL:

Q What did you pay for it?

A Before I came back this time, the insurance company replaced it with an identical model and it still has the price tag on it, $139.00 and some cents.

MR. ERGAZOS: OBJECT and ask that be stricken.

THE COURT: In your opinion then what was the value of it?

A To buy of the same vintage?

THE COURT: Its been used.

A I would say around $90.00.

MR. KANDEL: At this time, if it please the court, move for the admission into evidence of State's Ex. "A".

THE COURT: First, the motion to amend the Exhibit "C" will be granted.

[fol. 59] The statute specifically allows an amendment before, during or after trial. Its been testified to this particular check was forged and its been testified to that the name, by the girl witness, that is James Brookhart's endorsement, so it of course, proves it was a forgery.

MR. ERGAZOS: EXCEPTIONS.

THE COURT: The endorsement even was a forgery.

MR. ERGAZOS: OBJECT.

THE COURT: And there is no question the check was passed.

MR. KANDEL: If it please the Court, I believe you stated the exhibit, I believe you mean the indictment.

MR. ERGAZOS: EXCEPTIONS.

THE COURT: The indictment as to the . . . I allowed the number to be changed, and the name may now be changed to . . . Jimmie Cox to James Brookhart.

MOTION FOR ADMISSION OF EXHIBITS AND OBJECTIONS

MR. KANDEL: If it please the court, we move for [fol. 60] the admission into evidence of State's Ex. "A", "B", "C", "D", and "E".

MR. ERGAZOS: I believe "E" had already been accepted over objections.

Defendant at this time OBJECTS to the introduction into evidence of those exhibits other than "E". We spe-

cifically OBJECT to Ex. "C" inasmuch as it is at variance with the indictment returned in this case and particularly considerable variance between the information contained in the check and that which is set forth in the copy of the indictment which had been served on this defendant.

THE COURT: The Court finds it isn't material nor is it prejudicial. The statute says as to the name and identification, there isn't any question that the name of the crime is forgery, and the identification of the check [fol. 61] has been testified to by several witnesses. The objection is OVERRULED as to Exs. "A", "B", & "C" and they may be received into evidence. The objection to the photostatic copy of State's Ex. "D", that is, the photostatic copy itself, SUSTAINED, and that count will be along with the count of forgery on that as well as the passing, will be SUSTAINED, and both counts will be dismissed.

MR. ERGAZOS: For the purpose of the record, it is my understanding it is specifically the 7th and 8th counts that are being dismissed, is that correct?

THE COURT: That is correct. The Court finds him not guilty on the 7th and 8th counts for failure of proof. Anything further?

PLAINTIFF RESTS

MR. KANDEL: Nothing further from the State.

[fol. 62] MR. ERGAZOS: At this time, if the court please, the State having rested, the defendant moves for dismissal of counts one through six in Case No. 18139, and further moves for dismissal of both counts contained in the indictment returned in Case No. 18101, for the reason there has been a failure on the part of the State of Ohio to sustain the burden of proof as required in criminal cases.

FINDINGS OF THE COURT

THE COURT: OVERRULED. Now taking the indictment #18139, the count one, the court finds . . .

MR. KANDEL: If the court please, prior to the court findings, while the defendant has made his motion at this time the record doesn't reveal we rested our case.

THE COURT: I assume since he required a prima facie case only you have the opportunity now.

[fol. 63] MR. ERGAZOS: Nothing further from the defendant.

THE COURT: As to count one, the testimony clearly shows beyond a reasonable doubt the defendant is guilty of count one, and also of count two, uttering and publishing, that check. Count Three, the count based on Ex. "B", there isn't any question about the guilt of the defendant on that one, or on count four, the forgery of that check. The testimony is clear that all these checks were forged with defendant's knowledge and his presence at the time of the passing; the passing the court finds was done, some of them, by the defendant himself, and some by his co-defendant, a co-conspirator.

The Court finds the defendant guilty of . . . as charged in the indictment of #18139, except as to the 7th and 8th counts.

[fol. 64] Now coming to the indictment #18101 charging breaking and entering and grand larceny, there isn't any question there was a breaking and entering and the testimony of the co-conspirator Robert Mitchell, there isn't any question about his testimony which definitely makes the defendant present at the crime and guilty of that count. And as to all the evidence in this case the court finds the defendant is guilty of the second count of grand larceny. Besides this, in going to the question of guilt, of course, the court states on matters of law the statute allows such as flight, failure of the defendant to take the stand in his own defense, and all other matters that are legally competent to be considered.

MR. KANDEL: If the court please, as the court's [fol. 65] finding has now been entered in this case the State moves the court to pronounce sentence in this case on the defendant.

THE COURT: Defendant come forward.

Now, Mr. Brookhart, you have just heard the finding and decision of the court in finding you guilty on these charges the court has mentioned. Now, do you have anything to say why judgment should not be pronounced against you?

A Nothing, Your Honor.

MR. ERGAZOS: First, I have a statement or two before the court does pass sentence here. This defendant as the court noted there in the correspondence which the prosecutor presented to the court this morning, that this defendant did spend some time under a federal sentence, he spent time in Springfield Mental Hospital, a federal [fol. 66] institution, for a considerable period of time. I believe the majority of the time he was incarcerated under the federal statute, and he had asked to be returned to this jurisdiction to stand trial on these various matters. He was led to believe by the federal authorities that his time he was serving there would be considered in his state's cases. I realize the statements by the federal authorities are not binding on this court but I merely point this out to the court at this time.

THE COURT: You mean not binding even if the statements were made?

MR. ERGAZOS: I wasn't there, Your Honor.

That was the information that has come to me.

THE COURT: Yes, he committed these crimes here and he fled. He hadn't learned his lesson and got into further trouble.

[fol. 67] THE COURT: What was the trouble with the federal authorities?

MR. ERGAZOS: The Dyer Act. I might say to the court also, at the time of this occurrence in October of 1960 the defendant was taking benzedrine, he was drinking heavily, he actually has right along, he has had no recollection of these events there and by virtue of his hospitalization in a federal hospital he has helped himself and was hoping he could continue as such.

THE COURT: He may helped himself but his attitude in standing trial on these cases is nothing more than just taking a flier. He knew he was taking it, the court certainly knows he was just taking a flier, he never expected to be acquitted, something else is back of it.

There seems to be a rumor or understanding down in [fol. 68] the county jail or by one of the defendants, they haven't got a chance to get out of the pen or Mansfield, whichever one they are sentenced to, if they plead guilty, by that admission there is no chance whatever, but where they stand trial they still have a chance of another trial

and some court comes along and weakly, as the Supreme Court of the United States has done given the criminal more than he is entitled to under the law. The decision of the Supreme Court of the United States was five to four, showing the split of the Supreme Court. But be that as it may the defendant saw fit to stand trial and yet failed to take the witness stand, everything involved was an attitude of evading prosecution; his own letter that you spoke of, I can speak of now, that you re-
[fol. 69] ferred to, he wanted to evade prosecution, further prosecution on these charges.

SENTENCE PRONOUNCED

1:35 p.m.

[Reporter's Certificate to foregoing transcript omitted in printing]

[fol. 70]

THE SUPREME COURT OF OHIO

JAMES BROOKHART, PETITIONER

v.

E. B. HASKINS, Supt. etc., RESPONDENT

CERTIFICATE

I, THOMAS L. STARTZMAN, CLERK OF THE SUPREME COURT OF THE STATE OF OHIO, do hereby certify that the attached transcript is the original transcript of proceeding of March 23, 1962, filed in this Court in the above-entitled case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said SUPREME COURT OF OHIO this 3rd day of December, 1965

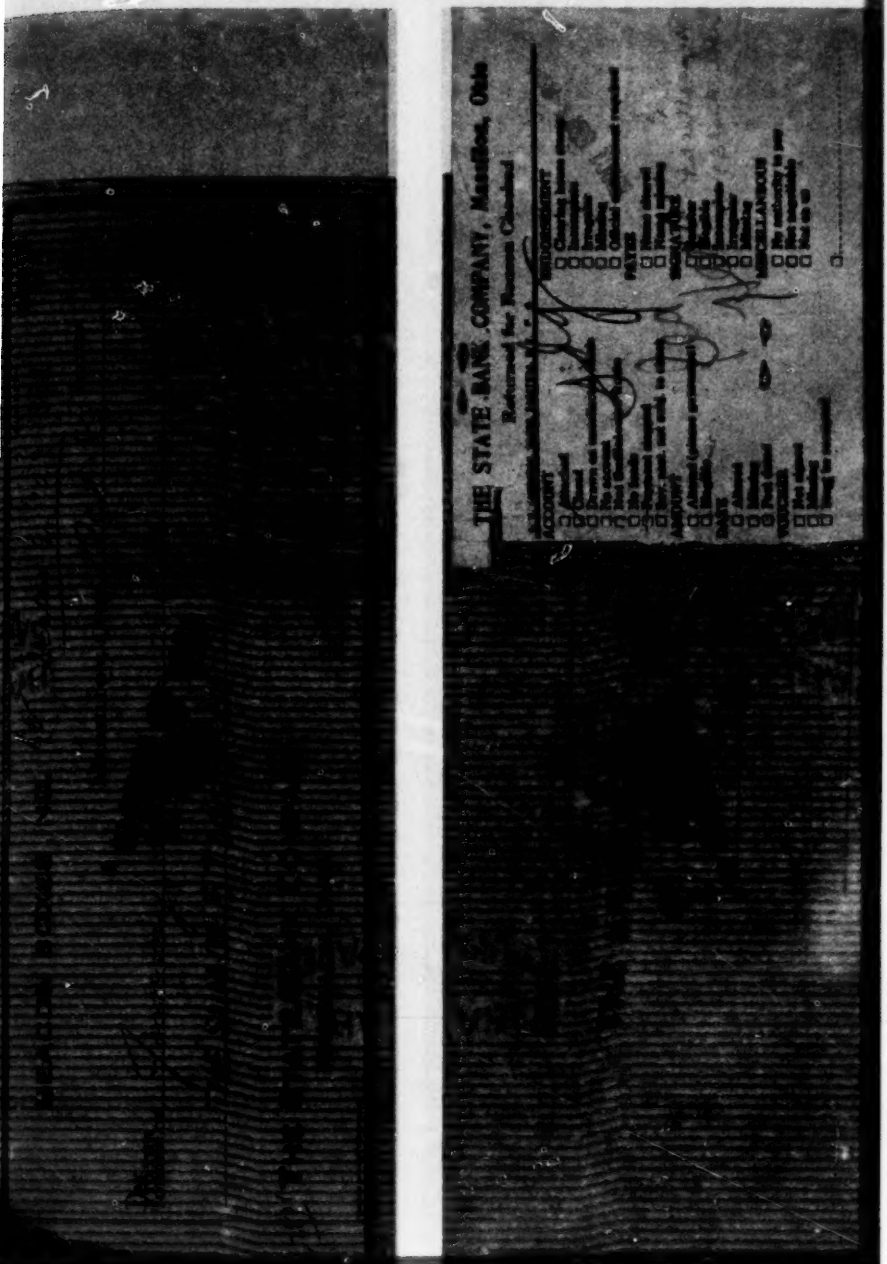
/s/ Thomas L. Startzman
Clerk, The Supreme Court of Ohio

[SEAL]

[fol. 71]

IN THE COURT OF COMMON PLEAS,
STARK COUNTY, OHIO

STATES EXHIBITS "A" "B" AND "C"



THE STATE BANK COMPANY

THE SUM OF ... DOLLARS

THE STATE BANK COMPANY, Massillon, Ohio

Returned for Reason Checked

ACCOUNT	**ENDORSEMENT**
☐ Attached	☐ Clearing house stamp
☐ Closed	☐ Incomplete
☐ Drawn on uncollected funds	☐ Irregular
☐ No account	☐ Missing
☐ Not Sufficient Funds	☐ Official endorsement required
☐ No funds	**PAYEE**
☐ Payment stopped	☐ Name altered
☑ Sav. acct. not subj. to check	☐ Name missing
AMOUNT	**SIGNATURE**
☐ Altered (please guarantee)	☐ Counter
☐ Illegible	☐ Illegible
DATE	☐ Incomplete
☐ Altered	☐ Irregular
☐ Missing	☐ Missing
☐ Post dated	**MISCELLANEOUS**
VOUCHER	☐ No authority to pay
☐ Not signed	☐ Not negotiable
☐ Missing	☐ Not on us
☐ Must be receipted	☐ ....

BEACON BOXES INC.

THE SUM OF 72.00 63.00

BEACON BOXES INC.

THE STATE BANK COMPANY
MASSILLON, OHIO

THE STATE BANK COMPANY, Massillon, Ohio
Returned for Reason Checked

ACCOUNT	ENDORSEMENT
☐ Attached	☐ Clearing house stamp
☑ Closed	☐ Incomplete
☐ Drawn on uncollected funds	☐ Irregular
☐ No account	☐ Missing
☐ Not Sufficient Funds	☐ Official endorsement required
☐ No funds	PAYEE
☐ Payment stopped	☐ Name altered
☐ Sav. acct. not subj. to check	☐ Name missing
AMOUNT	SIGNATURE
☐ Altered (please guarantee)	☐ Counter
☐ Illegible	☐ Illegible
DATE	☐ Incomplete
☐ Altered	☐ Irregular
☐ Missing	☐ Missing
☐ Post dated	MISCELLANEOUS
VOUCHER	☐ No authority to pay
☐ Not signed	☐ Not negotiable
☐ Missing	☐ Not on us
☐ Must be receipted	☐

[fol. 72]

IN THE COURT OF COMMON PLEAS
STARK COUNTY, OHIO

STATE'S EXHIBIT "E"

18101-139

STATE OF OHIO

vs

JAS. EDW. BROOKHART

3-23-62

GRAND JURY

CLASSIFIED
MATERIAL

STATEMENT
OF
RONALD KEITH MITCHELL,
TAKEN IN THE
PROSECUTOR'S OFFICE, CANTON, OHIO,
ON
FRIDAY 10:40 A.M., FEBRUARY 3, 1961.

[fol. 73]

GRAND JURY
STATEMENT
OF
RONALD KEITH MITCHELL,
TAKEN IN THE
PROSECUTOR'S OFFICE, CANTON, OHIO,
ON
FRIDAY 10:40 A.M., FEBRUARY 3rd, 1961.

CLASSIFIED
MATERIAL

APPEARANCES

HARRY KANDEL,
Assistant Prosecuting Attorney.

LEWIS NAPIER,
Investigator,
Sheriff's Department.

RICHARD BARNHART,
Investigator,
Sheriff's Department.

MILDRED I. HAAG,
Official Shorthand Reporter.

MR. KANDEL:

Mr. Mitchell, before we proceed with this statement I want to advise you that you have a right to be permitted to contact your attorney, if you desire to—to have his advice concerning whether or not you should give a statement. I will advise you further of the fact that if you give a statement and do so voluntarily, the facts and circumstances related therein can be used against you in

[fol. 74] a trial, and if you admit anything of a criminal nature, it can be used as evidence in any trial against you and it can be used against anyone else concerning matters which you talk about. Do you have an attorney?

A No.

Q Do you desire to get an attorney?

A No.

Q Do you desire to make the statement, knowing the fact that you are waiving your constitutional rights of testifying against yourself?

A Yes.

Q You understand that if you do give the statement, you are to be sworn to tell the truth and you could be charged with perjury if you lie in this statement. You understand that?

A Yes, sir.

Q Will you swear the witness?

WITNESS SWORN BY THE OFFICIAL SHORTHAND REPORTER

Q Your name is Ronald Keith Mitchell?

A Yes.

Q Where do you live, Mr. Mitchell?

A The last address here was 800 9th Street S. W., Canton.

Q Are you employed presently?

A No.

Q Are you married?

A No, divorced.

Q Divorced?

[fol. 75] A Yes.

Q Do you have any children?

A One.

Q Is your former wife and child living here in Stark County?

A No.

Q Where are they living?

A Miami, Florida.

Q How long have you been in Canton?

A One day.

Q Prior to your being here this one day today, how long had you been in Stark County?

A Since I was in the sixth grade, except when I went away awhile. We moved back and forth.

Q How old are you at the present time?

A Twenty-nine.

Q Going back to the 10th day of October, 1960, were you in Canton on that day?

A I think so.

Q To refresh your recollection, sir, this was the day that the Beacon Box, Inc., at Lennox Avenue S.W. in Perry Heights, Stark County, Ohio, was broken into. Were you here on that day?

A Yes, sir.

Q Where were you living at that time?

A At that same address—800 9th Street S. W.

Q Were you living there with anyone?

A No, just had a sleeping room.

[fol. 76] Q Did you know a man by the name of James E. Brookhart?

A Yes.

Q How long had you known him?

A I think a year or two before that.

Q Did you run around with Mr. Brookhart?

A We worked together some.

Q Do you know a woman by the name of Doris Brookhart?

A Yes.

Q Do you know her by any other name?

A Yes. Let's see—her other married name—let's see—what was that now? I don't know it—seemed like it was Smith or something. Jones.

Q Jones?

A Jones.

Q Doris Mae Jones, is that right?

A I am not sure about the middle name, but I think it was Jones.

Q How long have you known these people?

A I am not sure. I think it was a year or two before this.

Q Do you know where Doris Mae Jones or Doris Mae Brookhart is at the present time?

A No.

Q When was the last time you saw her?

A See, this happened on the 10th. I am just remembering, so—let's see—the next day—it took us one day to get there. 12th of October is the last I saw either one of them.

[fol. 77] Q And where was that?

A New York City—Jamaica, Long Island, New York.

Q Going back to the 10th of October, 1960, were you with Mr. Brookhart on that day?

A Yes.

Q About what time of the day did you first see him?

A That is hard to remember. Now, let's see now, I got to think here a minute. See, I was living then with them. They had this room on 3rd Street S. W. and they had this extra room and I rented it off of them. I can't remember if it was then. No, that was a little bit before that—that is right. That was a little bit before that, and then I got this other room, because I had trouble with the landlady, and I think I was living down there on 9th Street then.

Q Did you see Mr. Brookhart during the day of the 10th?

A Yes, we was together. I don't know exactly when we got together, but we were here going around looking for jobs—both looking for work at the time. I remembered that I worked out there before and I kept going back there, calling that guy up, two or three different times, and he said he would give me a job as soon as he had an opening, so I just kept checking with him on and off then.

Q On the 10th of October, did you go out to the Beacon Box, Inc. sometime during the business day?

A I could not say for sure we went out there together during the day. It probably was within a week of that [fol. 78] 10th, I imagine.

Q On the 10th of October, 1960, in the night time did you go out to this place?

A Yes.

Q About what time of the day was it?

A Let's see—it was—I think it was around 2:00 o'clock in the morning.

Q Would that have been on the 11th or the 10th?

A I am not sure. I don't know what day of the week it was. I can't remember. I know it was in the middle of the night when we went.

Q Who else went with you, if anyone?

A No one else.

Q How did you get there?

A His car.

Q What was your purpose for going there at 2:00 A. M. in the morning?

A He saw this check writer when we went out there that day. He was talking, telling me about how easy it is to cash these checks and he said, "You are not risking much. All you got to do is not go back to Canton and nobody else is going to be looking for you, accept the Canton police." And he said, "It is a minor charge." So he said, "That is the way for us to get some money." And I have been going down to Florida the last five years in a row now in the Winter time, and I just got away from Winter weather, actually the last ten years, [fol. 79] and I tried to go somewhere where it was warm in the Winter time.

Q You specifically went out with Mr. Brookhart to break into this place?

A Yes, to get this check writer. He said if we got that check writer, they are bound to have some checks there and we can—he could show me how to do it, he said—how to make them out.

Q How was entrance gained into this building?

A We walked around to the back and this window was open in the back, coming from Tuscarawas,—it was the first window in the back. It was open about two inches so we just pulled it the rest of the way open and walked in.

Q After you got in there where did you go?

A Then I noticed right away—see, this Beacon Box Company used to have this whole building, and I noticed right away there was some other company or something

in there, too, because that wasn't their equipment. So we just walked to the right then, because I didn't see any boxes there and I knew it evidently must be back on the right hand side.

Q Did you go into the office of the Beacon Box, Inc.?

A Yes.

Q When you got there did you find this check writer?

A Yes.

Q Did you find any blank checks?

[fol. 80] A Yes.

Q What did you do with the check writer?

A We took it.

Q How many checks did you take with you?

A I am not sure. We just took a bunch out of the middle of them. There was a whole—about that many—quite a few. There was quite a few, so I think we took around thirty—thirty some, I think.

Q After taking the checks and the check writer, did you do anything else in the building?

A No.

Q Did you go out the same way that you had come in?

A Yes.

Q After going out where did you go?

A They had this motel room out here off of 62 somewhere.

Q That was Doris and James Brookhart?

A Yes, and they had a little girl, too, with them.

Q Did you go to that motel?

A Yes, I went with them.

Q What did you do then?

A Then they put those checks in the check writer.

Q You say 'they' put them in?

A Yes.

Q Was Doris part of this?

A Yes, she signed the signatures—the name that—the man that was supposed to be paying the check.

Q That is R. J. Buchannon?

[fol. 81] A Yes, and Brookhart filled out—I mean put these checks in the check writer and filled out the amounts, and she signed that man's name.

Q Did she sign, also, the name of James Brookhart—payable to James Brookhart?

A They were both writing on them. I never filled out any of them, so they did all the writing that was on them. I guess she probably did some of that, too.

Q What was the reason for writing these checks, sir?

A We wanted to get some money to buy these—what they call joints for carnivals. That is tents and equipment to run those different games—it is tents. Just a word that is used—they call them joints—and we was going to go to Florida and put ourselves up in the carnival business and make our money that way.

Q How many checks did you see written here in Stark County?

A I don't know the exact number. I know it was—I cashed about—let's see—ten.

Q Here in Stark County?

A I would say approximately ten, yes, sir—checks—in Canton and Massillon.

Q Can you name the places where you cashed these checks, sir?

A I can't name them.

Q Well . . . .

A Let's see—it was Loblaws over in Massillon, was one. Loblaws at the corner of Whipple and Tuscarawas [fol.82] was another one. Let's see—that is two, and Kroger's, I think, there at the Country Fair Shopping Center. I think that is one—that is three. Let's see now. Three is all I can remember. I know I did more than that. Let's see where else. If they had a list of those checks, I could tell you the ones I cashed. I could tell my handwriting on them.

Q Did you sign James Brookhart's name on any of these checks?

A No.

Q These were all made payable to you?

A No, to this idea—they had this Georgia's chauffeur's license—whatever name that was.

Q Was that Jimmy Cox?

A Yes.

Q I have got one check in the amount of $52.82, payable to Jimmy Cox, purportedly signed by R. J. Buchannon. I will ask you if you passed that check, knowing it to be a forgery?

A No.

Q You did not pass that one?

A No, that is not mine.

Q Showing you another one payable to Jimmy Cox, $57.58—the name of Jimmy Cox on the back of that one.

A No, that is not mine, either, I don't believe. Let me see that—yes, it might be. Yes, I think that one is mine.

Q That one is yours?

[fol. 83] A Yes.

Q Were you present when the others were cashed?

A No, I waited in the car. Just one of us went in.

Q Let me ask you, sir—was your procedure on cashing these checks that all three of you or the four of you, including the little girl, would go to a place and one of you would go in and cash a check and come out with the money? Is that the way you operated?

A No, Doris and the little girl stayed in the motel and me and Brookhart went and cashed most of them, except a few. When we were leaving Canton then he cashed about three or four other ones on the way to the Turnpike, and she was in the car, but before that it was just me and him did it.

Q Over how long a period of time did you cash the checks in the Canton or Stark County area?

A Just one day.

Q And all of these checks were in the amount of odd numbers, such as $52.00, $72.00, $57.00?

A Yes, sir.

Q What was the total amount of money obtained by you and Mr. Brookhart and Doris Mae Brookhart in this manner?

A I think as far as I know—I mean the ones that they did and the ones that I did, before we got to New York—I don't know if he cashed any others—I heard that he did after that—but the ones I know about just here in Canton and on the way to the Turnpike was around—I be-

[fol. 84] lieve it was $700.00 or $800.00 total.

Q Did you split this money?
A No, sir.
Q Did you get any of the money?
A Yes. I got—first we were going to split it and then he said, "Well, whoever takes them in and cashes them—that way we each have to do the equal amount, but whichever ones I took in and cashed, I kept the money, and whichever ones he took in and cashed, he kept that money. So that is the way we did it.
Q I will ask you whether or not you recognize this photograph?
A Yes.
Q And who is that?
A James Brookhart.
Q And he is the man who was with you in the breaking and entering and also in the passing of these checks in the Stark County area?
A Yes, sir.
Q You say you left Mr. Brookhart in Jamaica, New York?
A Yes, sir.
Q Do you know where they were heading?
A Florida somewhere. They weren't sure which town—they said Florida.
Q After you left them in New York, I presume that Mr. Brookhart's wife and the little girl was along with him?
A They all left together.
[fol. 85] Q Where did they head, do you know?
A Florida.
Q What did you do?
A I stayed in New York and went to the race track and lost my portion of the money in about a week and a half, but I never saw them again.
Q And you were then picked up in Florida?
A In Atlanta.
Q Atlanta, Georgia?
A Yes.
Q Did you do any other breakings and enterings anywhere in Stark County while you were here?
A No, sir.

Q Have you ever been involved in any other criminal activity of any nature?

A No, sir, I have not—I sure have not.

Q This was your first venture in crime, sir?

A Yes, sir.

Q Do you know about whether Mr. Brookhart was involved in any other crimes?

A Not that I know of, except that he said he passed—cashed checks before, but I don't know where or how much or anything about it, and he just said—in fact, they both said they did that before, but I don't know where or anything else.

Q By both, do you refer to Doris Mae Brookhart?

A Yes, Doris.

[fol. 86] Q This little girl that was with them, was that Doris' daughter?

A Yes, but her other husband—ex-husband. I never knew him.

Q What was that child's name?

A Oh, I can picture her real plain, but I just can't—if I heard the name, I would know it, but I can't think of it.

Q Was her last name Smith?

A No, I think it was Jones.

Q Jones?

A The same as hers.

MR. NAPIER:

Q Did Doris dye her hair before she left Stark County?

A No, she didn't make any change in her appearance the last I saw her. She looked the same as always.

MR. KANDEL:

Anything else you boys know about?

MR. NAPIER:

We had heard she dyed her hair.

MR. BARNHART:

Did he give the name of the child?

MR. KANDEL:

No.

A If I think of it I will tell you.

MR. NAPIER:

A Sherry, it is?

A Yes, Sherry. I knew I would know it as soon as I

[fol. 87] MR. KANDEL:

Q Mr. Mitchell, is there anything else you want to tell us about your activities?

A Nothing, except what I told these men, and I don't know who it is up to, but I am perfectly willing—and my conscious almost demands it that even regardless if I got time, I want to be allowed, if they will give me a list of the ones—he told me that some of those people had to pay that money back themselves. I told them that—naturally none of this is right and I am sorry about it, but I would like to be able to pay those checks—pay those people back someday, if I get a job. Regardless of how much time I might serve before this, I would like to make some arrangements—I don't know how much I will make, but pay so much a week on them to at least get my conscience cleared up on it.

Q There is nothing else you want to add?

A No, except we took that check writer out there on Perry Road. I could probably show them where it was. I don't know—it has been all this time. I suppose it would be rusted, laying out in the weather. I think I could almost come close to showing them where it was that we threw it. Maybe they can get some value out of it.

Q Was this thrown away before you went to New York?

A Yes, as soon as we got done—they made all those checks out that night, and our idea was to bring that [fol. 88] check writer and put it back in there. We didn't want it, but it was getting daylight by the time we came back from the motel to come back over towards Massillon, and we didn't want to take a chance being seen taking it back in, so we decided just to throw it away then.

Q It there is nothing else, will you sign those notes, please?
A Yes, sir.

RONALD K. MITCHELL

(Shorthand notes signed by the witness.

11:02 A.M.

The above and foregoing is a true and correct transcript of the statement taken from Ronald Keith Mitchell, in the Prosecutor's Office, Canton, Ohio, on Friday, 10:40 A.M., February 3, 1961, as shown by the stenographic notes taken at the time the said statement was being given.

/s/ Mildred I. Haag
Official Shorthand Reporter.

[fol. 89]

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1965

No. 657

JAMES BROOKHART, PETITIONER

v.

STATE OF OHIO, RESPONDENT

STIPULATION

The parties to the above-entitled cause hereby stipulate that the attached documents are the originals of State's Exhibits A, B, C, and E, admitted into evidence in the proceeding conducted on March 23, 1962.

/s/ Lawrence Herman
Counsel for Petitioner

/s/ Leo J. Conway
Counsel for Respondent

[fol. 90]

IN THE SUPREME COURT OF OHIO

CASE NO. 39132

JAMES BROOKHART, PETITIONER

v.

E. B. HASKINS, Supt. etc., RESPONDENT

AGREED STATEMENT OF PROCEEDINGS BEFORE THE BOARD OF MASTER COMMISSIONERS

It is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that the following is an accurate description of the hearing conducted on November 24, 1964 before the Board of Master Commissioners:

No testimony was taken. Petitioner, in an unsworn statement, asserted the following three contentions: 1) That he had not been indicted upon the charges for which he was ultimately tried and that he had been denied adequate notice of the charges upon which he was tried; 2) that he had been denied his constitutional right of confrontation by reason of the introduction by the State of an alleged confession of a co-defendant; and 3) that he had been denied the right to cross-examine witnesses who testified against him.

The hearing before the Board of Master Commissioners was then adjourned to permit the Respondent to obtain the transcript of the trial of March 23, 1962. Thereafter, the hearing was resumed, and, in response to Petitioner's allegations, Respondent presented the documents attached to the Return to Writ and the transcript of the trial of [fol. 91] March 23, 1962 (Respondent's Exhibit No. 3). No witnesses testified in behalf of Respondent.

/s/ Lawrence Herman
Counsel for Petitioner

/s/ Leo J. Conway
Counsel for Respondent

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IN THE SUPREME COURT OF OHIO

CASE NO. 39132

JAMES BROOKHART, PETITIONER

v.

E. B. HASKINS, Supt. etc., RESPONDENT

TIFICATE OF APPROVAL TO AGREED STATEMENT OF PROCEEDINGS BEFORE THE BOARD OF MASTER COMMISSIONERS

, THOMAS L. STARTZMAN and WILBUR G. Y, do hereby certify that we comprised the Board of r Commissioners in the above-entitled case. We do y certify as true and correct the agreed statement ceedings before the Board of Master Commissioners above-entitled case.

/s/ Thomas L. Startzman
THOMAS L. STARTZMAN

/s/ Wilbur G. Cory
WILBUR G. CORY

[fol. 93]

ORIGINAL

IN THE SUPREME COURT OF OHIO

No. 39132

JAMES E. BROOKHART, PETITIONER

v.

E. B. HASKINS, Supt., London Correctional Institution, RESPONDENT

[File Endorsement Omitted]

REPORT OF MASTER COMMISSIONERS—Filed November 30, 1964

FINDINGS OF FACT:

This is an action in habeas corpus originating in this court. In March 1961, the Grand Jury of Stark County returned an indictment charging petitioner, James E. Brookhart, with four counts of forgery and four counts of uttering a forged instrument. A second indictment was returned charging petitioner with one count of breaking and entering into a business building in the night season with intent to steal property of value and one count of grand larceny. Petitioner pleaded not guilty and while represented by counsel waived in writing a trial by jury. The case was tried to the court March 23, 1961, on an agreement in which petitioner acquesed in as shown by the record that the state need only prove a prima facie case and that there would be no cross-examination. After a presentation of the state's evidence the court found petitioner guilty of three counts of forgery, three counts of uttering a forged instrument, the one count of breaking and entering and the one count of grand larceny. He was sentenced to the Ohio Penitentiary on each count, the sentences to run concurrently.

CONCLUSIONS OF LAW:

It is petitioner's contention that he was not tried upon [fol. 94] an indictment returned by a grand jury but rather upon one returned by the prosecutor. During the course of the trial, upon motion by the prosecutor, the court permitted the indictment to be amended to conform to the evidence. These amendments consisted of corrections of the check numbers and amounts thereof on two of the checks set forth in the indictment and also the amendment of the name of the payee on one of the checks set forth in the indictment.

Section 2941.30, Revised Code, provides in part as follows:

"The court may at any time before, during, or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. * * *."

This section permits amendments to indictments which do not change the nature or identity of the offense.

The indictments presently before us were forgery and uttering a forged instrument. They are complete on their face and properly charged the offense in issue. An amendment to an indictment for forgery or uttering which merely changes the check numbers, amounts or the names of the payee as set forth in the indictment are matters of form, not substance and in no way affects the nature or identity of the offense as charged. Thus, such amendments relating to form and not substance were proper. *Dye* v. *Sacks, Warden,* 173 Ohio St., 422.

Next, petitioner contends he was denied due process because he was not confronted with his accusers and that his counsel was not permitted to cross-examine the witnesses. The circumstances of which petitioner now complains arose from his own acts. These proceedings are all [fol. 95] a matter of record in open court. An examination of the record shows that petitioner signed a written waiver of a jury and agreed to be tried to the court. It further shows that petitioner although he did not plead

guilty agreed that all the state had to prove was a prima facie case, that he would not contest it and that there would be no cross-examination of witnesses. This was acquesed in by his counsel. In effect he said I won't plead guilty but if the state can prove a prima facie case, I won't contest it. It was analogous to a nolo contendere with an additional element requiring the state to prove a prima facie case. The state presented witnesses to prove the essential elements of the offenses charged on eight out of the ten counts upon which petitioner was charged.

It should be pointed out that the record shows that even after the jury waivers were executed and petitioner agreed to be tried on the basis of a prima facie case the court informed petitioner he could still have a full trial before a jury if he so desired and petitioner refused. Clearly no rights of petitioner were violated in the present case.

RECOMMENDATION: It is recommended that the writ be denied.

/s/ Wilbur G. Cory

/s/ Thomas L. Startzman

WGC:sa

[fol. 96]

* * * *

IN THE SUPREME COURT OF OHIO

BROOKHART v. HASKINS, SUPT., LONDON CORRECTIONAL INSTITUTION.

[Cite as Brookhart v. Haskins, Supt., 2 Ohio St. 2d 36.]

Habeas corpus—Amendments of indictment—Right to be confronted with accusers—Examination of witnesses—Nolo contendere or compromise between state and accused—Waiver of jury—Acquiescence of court—Proof of elements of offense—Accused represented by counsel—Constitutional rights of accused not violated.

No. 39132

OPINION—Decided March 31, 1965

IN HABEAS CORPUS.

This is an action in habeas corpus originating in this court. On March 1961, the Grand Jury of Stark County returned an indictment charging petitioner, James Brookhart, with four counts of forgery and four counts of uttering a forged instrument. A second indictment was returned charging petitioner with one count of breaking and entering a business building in the night season with intent to steal property of value and with one count of grand larceny. Petitioner pleaded not guilty and while represented by counsel waived in writing a trial by jury. This case was tried to the court on March 23, 1961, on an agreement, in which petitioner acquiesced as shown by the record, that the state need only prove a prima facie [fol. 97] case, and that there would be no cross-examination. After a presentation of the state's evidence, the court found petitioner guilty of three counts of forgery, three counts of uttering and forged instrument, the one count of breaking and entering and the one count of grand larceny. He was sentenced to the Ohio Penitentiary on each count, the sentences under the first indictment to run consecu-

tively, and the sentences under the second indictment to run concurrently with those imposed under the first indictment.

Mr. James Brookhart, in propria persona.

Mr. William B. Saxbe, attorney general, and *Mr. William C. Baird*, for respondent.

Per Curiam. It is petitioner's contention that he was not tried upon an indictment returned by a grand jury but rather upon one returned by the prosecutor. During the course of the trial, upon motion by the prosecutor, the court permitted the indictment to be amended to conform to the evidence. These amendments consisted of corrections of the check numbers and the amounts on two of the checks set forth in the indictment and also the correction of the name of the payee on one of the checks set forth in the indictment.

Section 2941.30, Revised Code, provides in part as follows:

"The court may at any time before, during, or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged."

This section permits amendments to an indictment, which do not change the nature or identity of the offense.

The indictments presently before us were for forgery and uttering a forged instrument. They were complete on their face and properly charged the offense in issue. An amendment to an indictment for forgery or uttering, which merely changes the check numbers, amounts or the names of the payee as set forth in the indictment, is a matter of form, not of substance, and in no way affects the nature or identity of the offense as charged. Thus, such amendments relating to form and not substance are proper. *Dye* v. *Sacks, Warden*, 173 Ohio St. 422.

[fol. 98] Next, petitioner contends that he was denied due process because he was not confronted with his accusers nor was his counsel permitted to cross-examine the witnesses. The circumstances of which petitioner now

complains arose from his own acts with the advice and consent of his counsel. These proceedings are all a matter of record in open court. The record shows that petitioner, although he did not plead guilty, agreed that all the state had to prove was a prima facie case, that he would not contest it, and that there would be no cross-examination of witnesses. To this, his counsel acquiesced. In effect he said, "I won't plead guilty but if the state can prove a prima facie case, I won't contest it."

The record indicates the following in this respect:

"The Court: Ordinarily in a prima facie case—the prima facie case is where the defendant, not technically or legally, in effect admits his guilt and wants the state to prove it.

"Mr. Ergazos: That is correct.

"The Court: And the court knowing that and the prosecutor knowing that, instead of having a half dozen witnesses on one point they only have one because they understand there will be no contest.

"A. I would like to point out in no way am I pleading guilty to this charge.

"The Court: If you want to stand trial we will give you a jury trial.

"* * *

"The Court: Make up your mind whether you require a prima facie case or a complete trial of it.

"Mr. Ergazos: Prima facie, Your Honor, is all we are interested in."

The procedure adopted here is similar to the plea of *nolo contendere* with an added condition that the state prove the prima facie case. This plea has never been either accepted or rejected in Ohio. It is urged that in view of the fact that pleas to an indictment are statutory, such a plea would not be acceptable in Ohio. This does not necessarily follow.

It has been pointed out that this ancient common-law plea is not in the strict sense a plea at all but rather a [fol. 99] compromise between the accused and the state. As is stated in *McNab* v. *State*, 42 Wyo. 396, 402, 295 P. 278:

"It is frequently said that the so-called plea of *nolo contendere* is not a plea in the strict sense of that term in criminal law. 16 C. J. 404; 8 R. C. L. 117. In early cases, it was treated as an implied confession, and more in the nature of a petition than a plea. *Hudson* v. *U. S.*, 272 U. S. 451, 454-455, 47 S. Ct. 127, 71 L. Ed. 347. In modern practice it is sometimes referred to as being in the nature of a compromise between the state and the defendant. *Young* v. *People*, 53 Colo. 251, 125 P. 117; *State* v. *La Rose*, 71 N. H. 435, 52 A. 943; *Tucker* v. *United States*, 196 F. 260, 116 C. C. A. 62, 41 L. R. A. (N. S.) 70. It is not one of the pleas which defendant can interpose as a matter of right, but is allowable only under leave of court. * * *" See, also, 14 American Jurisprudence, 954, Criminal Law, Section 275.

The fact that the pleas which may be entered to an indictment are a matter of statute does not necessarily affect the right of a court to accept a plea of *nolo contendere*. In *McNab* v. *State*, *supra*, 403, it is said:

"We do not think the common-law recognition of the plea is inconsistent with the statutes of criminal procedure that fail to make specific provision for it. The use of the plea does not interfere with either the statutory rights of the defendant or the statutory authority of the court. The defendant still has the right to plead guilty or not guilty, if he so desires. The court may refuse to accept the plea and thus require a plea of guilty or not guilty. We are of opinion, therefore, that the plea of *nolo contendere* was a permissible plea in the case at bar. If it was not, it would perhaps be difficult to escape the conclusion that the contention that the judgment of the justice was unauthorized presents only a moot question. The defendant voluntarily and on the advice of counsel tendered the plea expecting to be fined and intending to pay the fine. * * *"

This plea is not a matter of right but one that requires the acquiescence of the court. Annotation, 89 A. L. R. 2d 540, 563.

The fact that the procedure here was unusual did not affect the validity of the proceedings, nor did it constitute a denial of a fair trial. Petitioner was afforded all of his

[fol. 100] constitutional rights. There is no question that petitioner could have pleaded guilty to these charges if he had so desired and been sentenced accordingly, or he could have pleaded not guilty and forced the state to put on every witness it had and fully contested them not only through cross-examination but also by presenting a defense. This he did not choose to do. However, petitioner chose a middle ground. In open court, while represented by counsel, petitioner agreed that, although he would not plead guilty, he would not contest the state's case or cross-examine its witnesses but would require only that the state prove each of the essential elements of the crime. Certainly, if an accused has the right to plead guilty and thus relieve the state from presenting any proof of his guilt, he can agree that although he will not plead guilty he is willing to accept the verdict of the court based on limited evidence on each of the essential elements of the crime, and that he will not contest such evidence. No presumption of guilt was created by such agreement. The state was required to prove all the essential elements of the offense. The court, from this evidence, then determined the guilt of the accused. That no presumption arose or was in the mind of the court is clearly exemplified by the fact that the court found petitioner not guilty on two of the counts with which he was charged. It is apparent from the record that the court, in spite of its own statement that petitioner in effect admitted his guilt, felt that the burden was on the state to prove a prima facie case that petitioner was guilty.

The fact that such prima facie case might have been shaken if petitioner had chosen to introduce evidence or even to cross-examine the state's witnesses did not affect the validity of the conviction. Petitioner voluntarily and while represented by counsel waived such rights.

The procedure followed was agreed to by petitioner in open court while represented by counsel. As was stated in the second paragraph of the syllabus in *State* v. *Robbins*, 176 Ohio St. 362:

"Agreements, waivers and stipulations made by persons accused of crimes, or by their counsel in their presence, during the course of a trial for crime, are, after the

[fol. 101] termination of the trial, as binding and enforceable upon such persons as like agreements, waivers and stipulations are upon parties to civil actions. (Paragraph four of the syllabus of *State, ex rel. Warner,* v. *Baer et al., Judges,* 103 Ohio St. 585, approved and followed.)"

It should be pointed out that the record shows that, even after the jury waivers were executed and petitioner agreed to be tried on the basis of a prima facie case, the court informed petitioner that he could still have a full trial before a jury if he so desired, and petitioner refused.

A fair trial does not mean that an assuced must exercise all those rights which have been held necessary to constitute a fair trial. An accused must be *afforded* such rights; he need not take advantage of them. Thus, an accused may or may not be represented by counsel, it is his own choice; he may cross-examine or he may not cross-examine witnesses; he may call or he may not call witnesses on his own behalf; he may be tried before or in the absence of a jury—all at his own choice. To constitute a fair trial it is necessary only that such rights be *available* to the accused, not that he take advantage of them.

In the instant situation, petitioner was represented by counsel. The transcript shows that twice during the preliminary proceedings petitioner was informed that he could have a complete trial before a jury if he so desired and twice it was indicated to the court that all the defense desirecd was that the state prove a prima facie case. Petitioner cannot contend now that he was denied a fair trial.

Petitioner remanded to custody.

TAFT, C. J., ZIMMERMAN, O'NEILL, SCHNEIDER and BROWN, JJ., concur.

MATTHIAS and HERBERT, JJ., dissent.

HERBERT, J., dissenting. Among the questions raised by the petitioner in his application for release by habeas corpus are:

"(4) Is it legal to put a prisoner on trial prima facie [*sic*]?

[fol. 102] "(5) Was this a fair trial?"

I believe that these questions should be answered in the negative.

Petitioner being indigent, the court appointed counsel pursuant to the provisions of Section 2941.50 of the Revised Code. The petitioner entered a plea of not guilty.

Upon advice of counsel, petitioner waived his right to trial by jury and agreed to be tried by the court.

Respondent contends that petitioner "agreed," upon advice of counsel, to stand convicted of the crimes charged in the indictments if the evidence established a "prima facie case" of guilt.

In respect to this phase of the proceedings the record discloses:

"The Court: * * * I understand you signed two waivers of trial by jury.

"A [Defendant]: Thats correct, Your Honor.

"* * *

"The Court: Let the record so show, and then let the record show that counsel for the defendant has agreed to try, for the court to try the indictment No. 18101 and 18139 in the same trial.

"* * * [defense counsel]: Thats correct, Your Honor.

"The Court: Anything further?

"* * * [Prosecutor]: Nothing further.

"* * * [defense counsel]: The only thing is, Your Honor, this matter is before the court on a prima facie case.

"The Court: There being no . . . going to be no cross-examination of the witnesses, so the court will know and the state can't be taken by surprise, *the court doesn't want to be fooled and have your client change his mind half way through the trial and really contest it*, the state has a contest, we want to know in fairness to them so they can put on complete proof.

"* * * [defense counsel]: I might say this, Your Honor, if there is any testimony adduced here this morning which leaves any question as to this defendant in connection with this crime I would like to reserve the right to cross-examine at that time.

[fol. 103] "The Court: That is raising another . . . that is putting the state on the spot and the court on the

spot, *I won't find him guilty if the evidence is substantial.*

"* * * [defense counsel]: We have a jury question in the court, undoubtedly there will be . . .

"The Court: Ordinarily in a prima facie case . . . *the prima facie case is where the defendant, not technically or legally, in effect admits his guilt* and wants the state to prove it.

"* * * [defense counsel]: *That is correct.*

"The Court: And the court knowing that and the prosecutor knowing that, instead of having a half a dozen witness [*sic*] on one point they only have one because they understand there will be no contest.

"A [Defendant]: *I would like to point out in no way am I pleading guilty to this charge.*

"The Court: If you want to stand trial we will give you a jury trial.

"A [Defendant]: I have been incarcerated now for the last eighteen months in the county jail.

"The Court: You don't get credit for that.

"A [Defendant]: For over two months my nerves have been . . . I couldn't stand it out there any longer, *I would like to be tried by this court.*

"The Court: Make up your mind whether you require a prima facie case or a complete trial of it.

"* * * [defense counsel]: Prima facie, Your Honor, is all we are interested in.

"The Court: All right." (Emphasis added.)

It cannot be doubted that the court accepted a special plea, this prima facie proof plea. Recognition of special pleas in criminal cases is denied both by statute and this court.

Section 2943.03, Revised Code, definitely specifies the pleas that may be entered:

"Pleas to an indictment or information are:

"(A) Guilty;

"(B) Not guilty;

"(C) A former judgment of conviction or acquittal of the offense;

[fol. 104] "(D) Once in jeopardy;

"(E) Not guilty by reason of insanity."

The majority opinion recognizes its vulnerability by reason of the intrusion of the special plea in the trial court and in defense of this procedural novelty likens it to the old common-law of *nolo contendere. Nolo contendere* is not a plea but merely a formal declaration by an accused person that he will not contest the charge. 22 Corpus Juris Secundum 1202, Criminal Law, Section 425 (1); annotation, 89 A. L. R. 2d 540 (1963).

The majority opinion relies heavily upon the case of *McNab* v. *State*, 42 Wyo. 396, where the court reluctantly approved the use of *nolo contendere* in one case without commending it for use in general practice. But why look to Wyoming when the statutes, *supra*, do not recognize special pleas, and this court, in *Richards* v. *State*, 110 Ohio St. 311, at page 313, spoke as follows:

"*The criminal procedure of Ohio does not recognize a special plea* of the character which was entered in this case, and *it is clearly contemplated by the statutes that the plea must either be that of guilty or not guilty.* This special plea must therefore be treated as either the one or the other. If it should be held that the special plea as entered does not admit the material allegations of the indictment, then it should be held to constitute a plea of not guilty. If on the other hand the material allegations of the indictment are not controverted by the special plea, then it must be held to amount to a plea of guilty of the offense charge." (Emphasis added.)

It was the duty of the trial court under the Ohio Constitution, statutes and the pronouncement of this court in the *Richards case* to have considered the special plea as one of not guilty and proceeded to try the cause. The majority opinion supports this conclusion when it says:

"* * * *although he did not plead guilty* * * *." (Emphasis added.)

The only plea that the trial court could properly consider was one of not guilty. The cause should have proceeded upon such a plea which clothed the petitioner with the presumption of innocence, which remained with him until his guilt was proved beyond a reasonable doubt. Section 2945.04, Revised Code.

[fol. 105] Both the trial court and defense counsel considered the petitioner guilty before the hearing commenced, as is evidenced by the record, in this language:

"The Court: * * * the prima facie case is where the defendant, not technically or legally, in effect admits his guilt and wants the state to prove it.

"* * * [defense counsel]: That is correct."

City of Cleveland v. *Keah*, 157 Ohio St. 331, in the second paragraph of the syllabus, takes issue with the trial court's conception of a prima facie case, when it states this principle of law:

"A prima facie case is one in which the evidence is sufficient to support but not to compel a certain conclusion and does no more than furnish evidence to be considered and weighed but not necessarily to be accepted by the trier of the facts." The trial judge eliminated from his mind any thought of acquittal or any presumption of innocence. This is but an example of the confusion and injustice certain to follow in Ohio under the majority opinion which opens the door to any type of special plea that a trial court may accept. The trial court during the proceedings also said:

"* * * I won't find him guilty if the evidence is substantial."

It appears that the judge was of the opinion that he would not be required to return a verdict of acquittal unless the petitioner produced substantial evidence of innocence.

It appears reasonable to conclude that the trial court considered the defendant guilty before the beginning of the proceedings as is evidenced by its language that:

"* * * the prime facie case is where the defendant, not technically or legally, in effect admits his guilt and wants the state to prove it."

Also, after finding the defendant guilty of the charges, the trial court stated as follows:

"The Court: * * * his attitude in standing trial on these cases is nothing more than just taking a flier. He knew he was taking it, the court certainly knows he was

just taking a flier, he never expected to be acquitted * * *."

[fol. 106] It is claimed in the majority opinion that:

"The proceduce followed was agreed to by petitioner in open court while represented by counsel." On the contrary, the record transcribed by the "official shorthand reporter" discloses that the petitioner in open court, addressing the court, said:

"I would like *to point out in no way am I pleading guilty* to this charge."

His counsel:

"Prima facie, Your Honor, is all we are interested in."

It is reasonable to conclude that the petitioner correctly interpreted the colloquy between the court and counsel that prima facie proof was an admission of guilt on his part and he protested vigorously against such proceedings. In fact, following that protest petitioner stated: "I would like to be tried by this court."

Since petitioner did not acquiesce in the statement of his counsel to the court, the question arises as to who has the final control over decisions of a defense, when the defendant is present in court and understands the circumstances from which he draws his conclusions. It is our belief that under such circumstances the decision of the defendant is conclusive.

It appears to the writer of this dissent, however, that a far graver question arises from the apparent coercion and duress visited upon the petitioner by the state. Again we refer to the record:

"A [Defendant]: I would like to point out in no way am I pleading guilty to this charge.

"The Court: If you want to stand trial we will give you a jury trial.

"A [Defendant]: *I have been incarcerated now for the last eighteen months in the county jail.*

"The Court: You don't get credit for that.

"A [Defendant]: For over two months my nerves have been . . . I couldn't stand it out there any longer, I would like to be tried by this court." (Emphasis added.)

It appears further that the petitioner had been an inmate of a mental institution. He was held in jail without trial for 18 months and was denied a trial during all that [fol. 107] period until in desperation he said to the court, "I couldn't stand it out there any longer."

We do not believe that justice requires such treatment of indigents who are held in jail. Their cases should be disposed of at the earliest opportunity, but for some reason, which we do not know, this man, contrary to the provisions of the federal and state Constitutions, was denied a speedy public trial, with the result that even under those circumstances he insists that he does not plead guilty, declares that he will not make any admissions of guilty, and the court refuses to follow the procedure required when the defendant stands on a plea of not guilty.

The Constitution of Ohio, in the Bill of Rights, provides in Section 10, Article I, that:

"* * * in any trial, in any court, the party accused shall be allowed * * * a speedy public trial * * *."

In the Sixth Amendment to the federal Constitution, it is declared that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *."

The proceedings involved in the case at bar were not authorized by the law of Ohio, nor did the court have jurisdiction to pronounce sentence upon the petitioner. Consequently his imprisonment is illegal and contrary to law and he is deprived of his liberty without due process of law. The court should order the petitioner released from custody.

MATTHIAS, J., concurs in the foregoing dissenting opinion.

[fol. 108]

IN THE SUPREME COURT OF OHIO
January Term 1964

Case No. 39132

JAMES BROOKHART, PETITIONER

v.

E. B. HASKINS, SUPT. ETC., RESPONDENT

In Habeas Corpus

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DOCKET ENTRIES

Date	Memoranda of Pleadings, Etc., Filed, Writs Issued Etc., Judgments, Orders and Decrees
September 23, 1964	Petition (18) for a Writ of Habeas Corpus and certificate of service filed.
October 13, 1964	Return of Writ and certificate of service filed.
November 24, 1964	Hearing before the Master Commissioners.
November 30, 1964	Report of Master Commissioners filed and copies issued to Petitioner and Attorney General.
December 23, 1964	Petitioner's exceptions to report of Master Commissioners filed.

[fol. 109]

March 31, 1965	Petitioner remanded to custody.
October 18, 1965	Entry of United States Supreme Court granting Certiorari filed.

[fol. 110]

IN THE SUPREME COURT OF OHIO

Case No. 39132

BROOKHART

v.

HASKINS, SUPT.

JUDGMENT—March 31, 1965

In Habeas Corpus

This cause was considered by the Court on the petition, return of writ, report of master commissioners and petitioner's exceptions. On consideration whereof, it is ordered by the Court that, for the reasons set forth in the opinion rendered in this case, the petitioner is hereby remanded to custody.

[fol. 111]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 112]

SUPREME COURT OF THE UNITED STATES
October Term, 1965

No. 99 Misc.

JAMES BROOKHART, PETITIONER

v.

OHIO

On petition for writ of Certiorari to the Supreme Court of the State of Ohio.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—October 11, 1965

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 657 and placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 7[illegible]7011 416

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 657

JAMES BROOKHART,

Petitioner,

vs.

MARTIN A. JANIS, Director of the Ohio Department of Mental Hygiene and Correction,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR THE PETITIONER

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 657

JAMES BROOKHART,

Petitioner,

vs.

MARTIN A. JANIS, Director of the Ohio Department of Mental Hygiene and Correction,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Supreme Court of the State of Ohio (R. 78-88) is reported at 2 Ohio St. 2d 36, 205 N.E. 2d 911 (1965).

Jurisdiction

The judgment of the Supreme Court of the State of Ohio was entered March 31, 1965 (R. 90). The petition for a writ of certiorari was filed April 17, 1965, and was granted October 11, 1965. The jurisdiction of this Court rests on 28 U.S.C. §1257(3).

Questions Presented

I.

Is a defendant unconstitutionally precluded, in violation of the Sixth and Fourteenth Amendments, from contesting the State's case by cross-examination or by any other means when, in a state criminal prosecution, jury trial is waived and the defendant's court-appointed attorney enters into an arrangement with the judge and the prosecutor whereby the State is relieved of proving defendant's guilt by proof beyond a reasonable doubt and the defendant is barred from contesting the State's case by cross-examination, presentation of evidence, or any other means; the court indicates that the arrangement entered into is one in which "the defendant, not technically or legally, in effect admits his guilt and wants the State to prove it"; the defendant insists that he is "in no way" pleading guilty; the court responds to the defendant's plea by advising him that he may have a jury trial if he wishes to stand trial; the defendant rejects the court's offer of a jury trial on the ground that he had been in the county jail for two months and he "couldn't stand it out there any longer," and then begs to be tried by the court; the court demands an election between a jury trial and an uncontested case; the court-appointed attorney agrees that he will not contest the State's case, and no further exploration of the defendant's views on the question is attempted; a procedure ensues in which none of the State's witnesses is cross-examined, a purported confession of a previously-convicted co-defendant is introduced, and the court-appointed attorney is chastised for "trying the case on the merits" when he objects to proof of an offense not charged in the indictment?

II.

In a non-jury trial, is a defendant unconstitutionally denied his Fourteenth Amendment due process right to have the question of his guilt or innocence determined by an impartial judge solely on the basis of the evidence presented at trial when, despite the defendant's plea of not guilty, the judge, at the outset of the hearing, states that the defendant has admitted his guilt; the judge expressly states that he considers the defendant's failure to testify as evidence of guilt despite the presentation of an unrefuted explanation of the failure to testify which is entirely inconsistent with an inference of guilt; after conviction, the judge excoriates the defendant for exercising his constitutional right to plead not guilty, characterizes the plea as frivolous, asserts that the plea was motivated by an improper desire to seek appellate review, and states that the plea indicates an attitude of unrepentance?

III.

Is a defendant denied adequate notice of the charges upon which he is tried and an adequate opportunity to defend against those charges, and are convictions obtained upon an indictment amended during trial violative of the due process requirements of the Fourteenth Amendment when, in a State criminal prosecution, the defendant is indicted on several counts of forgery and several counts of uttering forged checks; the indictment specifically describes the checks upon which the charges are predicated; the defendant's court-appointed attorney enters a plea to the charges which is deemed by the court to preclude the defendant from contesting the State's case and is further deemed to require the State to establish only a "prima facie case"; the State is unable to produce any evidence to dem-

onstrate that the defendant forged and uttered the checks described in the indictment; and the state is permitted, over defendant's objection, to amend the indictment in the midst of trial by changing the description of the forged checks with respect to number, amount payable, and name of payee?

Constitutional Provisions and Statute Involved

UNITED STATES CONSTITUTION

Amendment V:

> No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . .

Amendment VI:

> In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . .

Amendment XIV:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATE STATUTE

Ohio Rev. Code §2941.30 (1953):

> The court may at any time before, during, or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name

or identity of the crime charged. If any amendment is made to the substance of the indictment or information or to cure a variance between the indictment or information and the proof, the accused is entitled to a discharge of the jury on his motion, if a jury has been impaneled, and to a reasonable continuance of the cause, unless it clearly appears from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that his rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. In case a jury is discharged from further consideration of a case under this section, the accused was not in jeopardy. No action of the court in refusing a continuance or postponement under this section is reviewable except after motion to and refusal by the trial court to grant a new trial therefor, and no appeal based upon such action of the court shall be sustained, nor reversal had, unless from consideration of the whole proceedings, the reviewing court finds that the accused was prejudiced in his defense or that a failure of justice resulted.

Statement

In an eight-count indictment filed in the Court of Common Pleas of Stark County, Ohio, on March 3, 1961, Doris Mae Jones, Ronald K. Mitchell, and Petitioner were charged with four counts of forgery[1] and four counts of uttering forged instruments[2] (R. 5-9). In a second indictment filed

[1] Ohio Rev. Code §2913.01 (1953).

[2] *Ibid.*

on the same day, Petitioner and Ronald K. Mitchell were charged with breaking and entering[3] and grand larceny[4] (R. 10-11). When arraigned on January 29, 1962, Petitioner entered pleas of not guilty to all charges. Two days later, counsel was appointed to represent Petitioner (R. 12-13). Unable to make bond, Petitioner remained in jail from the time of his arrest.

On March 23, 1962, after Petitioner's co-defendants had been convicted, the indictments in which Petitioner was named were consolidated for trial, written waivers of jury trial were entered, and Petitioner was "tried" by the court (R. 20-21). Petitioner was found guilty on three counts of forgery, three counts of uttering, one count of breaking and entering, and one count of grand larceny. Consecutive sentences of one to twenty years were imposed on each of the forgery counts to run concurrently with sentences on all other counts (R. 14-19).

On October 15, 1964, Petitioner filed a Petition for Writ of Habeas Corpus in the Supreme Court of Ohio (R. 1-3). A Return to Writ was filed by the Respondent below setting forth the judgment of conviction and sentence upon which Petitioner was being held in the London Correctional Institution (R. 4). On November 24, 1964, a hearing was held by the Board of Master Commissioners of the Supreme Court of Ohio. At the hearing Petitioner contended that, at his trial on March 23, 1962, he had been denied the right to confront and cross-examine his accusers, that he had been tried upon charges other than those contained in the indictments returned against him, and that he had been denied reasonable notice of the charges ultimately tried. In answer

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[3] Ohio Rev. Code §2907.10 (1953).

[4] Ohio Rev. Code §2907.20 (1953).

to these allegations, Respondent introduced a transcript of the proceedings which had resulted in Petitioner's conviction (R. 72).

The transcript disclosed the following: At the commencement of Petitioner's "trial" on March 23, 1962, the court requested Petitioner to acknowledge the fact that he had signed written waivers of his right to a jury trial. Petitioner complied with the court's request (R. 20-21). The court then related that defense counsel had agreed that the two indictments in which Petitioner was named as Defendant be consolidated for trial (R. 21). Further conversation regarding the manner in which the "trial" was to be conducted followed:

> Mr. Ergazos:[5] The only thing is, Your Honor, this matter is before the court on a prima facie case.
>
> The Court: There being no . . . going to be no cross-examination of the witnesses, so the court will know and the State can't be taken by surprise, the court doesn't want to be fooled and have your client change his mind half way through the trial and really contest it, the State has a contest, we want to know in fairness to them so they can put on complete proof.
>
> Mr. Ergazos: I might say this, Your Honor, if there is any testimony adduced here this morning which leaves any question as to this defendant in connection with this crime I would like to reserve the right to cross-examine.
>
> The Court: That is raising another . . . that is putting the State on the spot and the court on the spot, I won't find him guilty if the evidence is substantial.
>
> Mr. Ergazos: We have a jury question in the court, undoubtedly there will be . . .

[5] Petitioner's court-appointed attorney.

The Court: Ordinarily in a prima facie case . . . the prima facie case is where the defendant, not technically or legally, in effect admits his guilt and wants the State to prove it.

Mr. Ergazos: That is correct.

The Court: And the court knowing that and the Prosecutor knowing that, instead of having a half a dozen witnesses on one point they only have one because they understand there will be no contest.

A. I would like to point out in no way am I pleading guilty to this charge.

The Court: If you want to stand trial we will give you a jury trial.

A. I have been incarcerated now for the last eighteen months in the county jail.

The Court: You don't get credit for that.

A. For over two months my nerves have been . . . I can't stand it out there any longer, I would like to be tried by this court.

The Court: Make up your mind whether you require a prima facie case or a complete trial of it.

Mr. Ergazos: Prima facie, Your Honor, is all we are interested in.

The Court: All right.[6]

At the conclusion of this colloquy, opening statements were waived, and the "trial" proceeded (R. 22). The State attempted to have its first witness identify a check which had been marked as State's Exhibit A for identification.

[6] (R. 21-22).

Defense counsel objected to any testimony regarding the exhibit, but before any reason was stated for the objection, the court interrupted counsel and demanded, "Are you trying the case on the merits or just want the State to make a prima facie case?" (R. 23). Defense counsel did not respond to the inquiry. Instead, the prosecutor advised the court that there were typographical errors in the indictment and he moved to amend counts one and two of the forgery and uttering indictment by changing the number and amount of the check described in those counts. Over objection of defense counsel, the motion to amend was granted (R. 23-24). The State was also permitted to amend counts three and four of the forgery and uttering indictment by changing the number of the check allegedly forged and uttered (R. 25-26). Counts five and six were also amended with respect to the number and amount of the check described (R. 26). But even the amended charges did not correspond to the description of the check ultimately introduced in support of counts five and six. The State found it necessary further to amend those charges by changing the name of the payee (R. 32-33). Before taking the State's last motion to amend under consideration (R. 35, 38), the court expressed some vexation:

> The Court: Whoever made this up certainly made [fol. 25] some blunders, the court can emphatically say they are not material and can't be amended. In all cases whether a matter of forgery, the instrument was forgery, the description incidentally . . . but the description should be corrected . . . at least explained for identification purposes. Now, this is the exhibit . . . .[7]

[7] (R. 33).

At the conclusion of the "trial," the court granted th State's motion to amend the amended charges contained i counts five and six (R. 52). Defense counsel's objections t each of the amendments were uniformly rejected.[8]

At the conclusion of the testimony of Doris Jones, co-defendant called as the State's second witness, the prose cutor made the following statement:

> If it please the Court, Mildred Haag took a statemen off of the other defendant, Ronald Mitchell and I believ there has been shown here a conspiracy which woul permit this into evidence and I have it marked a State's Ex. "E". I have this and I have called Mis Haag to come in and testify as to her taking . . . observe Mildred Haag's signature here at the botto of the statement and I recognize this as her statemen I was also present at the time of taking the statement

Defense counsel's objection to admission of the statemen was heard and rejected (R. 39). The statement, purportedl taken from Mitchell on February 3, 1961, after Mitche had been arrested, contained admissions that Mitchell an Petitioner had broken into a building occupied by the Bea con Box Company on October 10, 1960; that they ha stolen checks and a check writer from the office of Beaco Box; that the checks and check writer had been taken t a motel room; that Doris Jones had filled in the checks and that Mitchell and Petitioner had then cashed the check at various places in and around Canton (R. 59-67). Th statement also indicated that Mitchell, upon request of th prosecutor participating in the interrogation, had signe

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[8] (R. 24, 25, 26, 32, 33, 35, 38, 52).

[9] (R. 39).

the shorthand notes that had been taken during the interrogation (R. 70). Mitchell, who had already been convicted of the offenses charged, was not called to testify.

When the State concluded its presentation, the court dismissed the seventh and eighth counts of the forgery and uttering indictment because the State had failed to present the check described in those counts—the only counts which had not been amended (R. 53). Defense counsel's motion for dismissal of the remaining counts was overruled (R. 53). Explaining its ruling, the court stated:

> Now coming to the indictment #18101 charging breaking and entering and grand larceny, there isn't any question there was a breaking and entering and the testimony of the co-conspirator Robert Mitchell, there isn't any question about his testimony which definitely makes the defendant present at the crime and guilty of that count. And as to all the evidence in this case the court finds the defendant is guilty of the second count of grand larceny. Besides this, in going to the question of guilt, of course, the court states on matters of law the statute allows such as flight, failure of the defendant to take the stand in his own defense, and all other matters that are legally competent to be considered.[10]

The prosecutor then asked that sentence be pronounced. Defense counsel advised the court that Petitioner had been in Springfield Mental Hospital "for a considerable period of time," that he had no recollection of the events which had given rise to the indictment, and that he had attempted to help himself during the period of his hospitalization

[10] (R. 54).

(R. 55). Unmoved by counsel's remarks, the court responded:

> He may have helped himself but his attitude in standing trial on these cases is nothing more than just taking a flier. He knew he was just taking it, the court certainly knows he was just taking a flier, he never expected to be acquitted, something else is back of it.
>
> There seems to be a rumor or understanding in the county jail or by one of the defendants, they haven't got a chance to get out of the pen or Mansfield, whichever they are sentenced to, if they plead guilty, by that admission there is no chance whatever, but where they stand trial they still have a chance of another trial and some court comes along and weakly, as the Supreme Court of the United States has done given [sic] the criminal more than he is entitled to under the law. The decision of the Supreme Court of the United States was five to four, showing the split of the Supreme Court. But be that as it may the defendant saw fit to stand trial and yet failed to take the witness stand, everything involved was an attitude of evading prosecution . . . .[11]

Without further comment, the court sentenced Petitioner to a term of three to sixty years.

Upon the facts stated above, the Board of Master Commissioners recommended that the writ be denied. Relying upon Ohio Rev. Code §2941.30 which allows an indictment to be amended "provided no change is made in the name or identity of the crime charged," the Master Commis-

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[11] (R. 55-56).

sioners concluded that the amendments of six counts of the forgery and uttering indictment were properly allowed. Petitioner's assertion that he had been denied a fair trial by an arrangement which precluded him from contesting the State's case by cross-examination or any other means was summarily dismissed. Although the facts upon which the assertion was predicated were not denied, the Master Commissioners had the following explanation of those facts:

> The circumstances of which petitioner now complains arose from his own acts . . . . It [the record] further shows that petitioner although he did not plead guilty agreed that all the State had to prove was a prima facie case, that he would not contest it and that there would be no cross-examination of witnesses. This was acquiesced in by his counsel. In effect he said I won't plead guilty but if the state can prove a prima facie case, I won't contest it. It was analogous to a nolo contendere with an additional element requiring the state to prove a prima facie case.[12]

The Supreme Court of Ohio, with two judges dissenting, adopted the views of the Master Commissioners. It found that "petitioner acquiesced" (R. 77) in the arrangement which allowed the state to prove only a prima facie case. Alternatively, the court stated that Petitioner had agreed that he would not contest the state's case and that there would be no cross-examination of the state's witnesses, and that "his counsel acquiesced" (R. 79) in the arrangement. The court characterized the procedure adopted as "similar to the plea of *nolo contendere* with an added condition that the state prove the prima facie case." The procedure was

[12] (R. 75-76).

viewed by the court as a "middle ground" between a ple of not guilty and a plea of guilty. Since Petitioner ha chosen that procedure by rejecting "a complete trial befor a jury," the court held that he could not contend that h had been denied a fair trial (R. 82). Petitioner was ordere remanded to custody (R. 90).

Summary of Argument

I.

A. *Loss of Petitioner's right to contest the State's cas by cross-examination or by other means.* Because Petitione exercised his fundamental constitutional right to plead no guilty (R. 74, 77, 79, 81), he was entitled to all of the con stitutional safeguards customarily accorded a defendant i a criminal case, including the right to contest the State's cas by cross-examination or by oth r means. Petitioner's court appointed attorney, acting without Petitioner's consent, en tered into an arrangement with the State pursuant to whic arrangement the State was required to prove no more tha a prima-facie case (R. 21-2). This arrangement barre Petitioner from contesting the State's case by any means including cross-examination of the State's witnesses (R 21-2). During the subsequent hearing, there was no cross examination of any of the State's witnesses even thoug eighteen months had elapsed between the date of the al leged incidents and the date of the trial. Moreover, th State tendered as evidence against Petitioner a highly in criminating transcript of an extra-judicial interrogation o an alleged co-conspirator (R. 39, 58-70) which interrogatio had occurred some four months after the alleged incidents Although the transcript was obviously inadmissible, *Doug las* v. *Alabama,* 380 U.S. 415; *Pointer* v. *Texas,* 380 U.S

400, it was accepted as evidence (R. 39), and the trier of fact specifically referred to it as evidence of Petitioner's guilt (R. 54). Manifestly, Petitioner was prejudicially stripped of his constitutional right to contest the State's case by any means, including the constitutional right of cross-examination.

B. *Absence of waiver.* Although Petitioner waived his state constitutional right to a jury trial, at no time did he expressly relinquish or abandon his federal constitutional rights. Nor can a waiver be inferred from silence for the reason that Petitioner was not silent. Indeed, he expressly rejected the arrangement of a prima facie case by insisting, "I would like to point out in no way am I pleading guilty to this charge" (R. 22). Thereafter, forced by the trial judge to choose between a contested *jury* trial (with attendant delay and additional pre-trial confinement) and a no-contest, bench hearing, Petitioner again insisted on his rights by demanding that he be *tried* by the court (R. 22). Having twice insisted on his rights, it was unnecessary for him to insist a third time on peril of waiver. See *Glasser* v. *United States,* 315 U.S. 60, 72. The conclusion of the court below that Petitioner waived his rights is unsupported by the record and is utterly irreconcilable with the well-settled presumption against waiver of fundamental rights. *Johnson* v. *Zerbst,* 304 U.S. 458, 464.

C. *Retrospectivity.* Petitioner's conviction became final before this Court applied to state criminal proceedings the Sixth Amendment rights to confrontation and cross-examination. However, there is no substantial problem of retrospective application in the instant case. Because the rights to confrontation and cross-examination are "implicit in the concept of ordered liberty," *Pointer* v. *Texas,* 380 U.S. 400,

408 (concurring opinion by Harlan, J.), they are a part of the due process of law to which Petitioner was entitled under the Fourteenth Amendment. Alternatively, because confrontation and cross-examination are essential to "exposing falsehood and bringing out the truth in the trial of a criminal case," *Pointer* v. *Texas, supra* at 404, they bear directly on "the very integrity of the fact-finding process," *Linkletter* v. *Walker,* 381 U.S. 618, 639, and retrospective application is required.

II.

A. *Prejudice manifested by the trial judge (the trier of fact).* Because the trial judge was the trier of fact, it was absolutely essential to a fair hearing that he not pre-judge the case. By stating at the outset of the hearing that Petitioner "admits his guilt" (R. 21) the fact-finder did prejudge the case and thereby deprived Petitioner of a fair hearing. *In re Murchison,* 349 U.S. 133; *Juelich* v. *United States,* 214 F.2d 950 (5th Cir. 1954). The sole fact-finder's expression of belief in guilt was more subversive of fair trial than the conduct proscribed by this Court in *Rideau* v. *Louisiana,* 373 U.S. 723; *Irvin* v. *Dowd,* 366 U.S. 717; and *Tumey* v. *Ohio,* 273 U.S. 510.

Equally subversive of fair trial was the fact that, during the sentencing procedure, the trial court stigmatized Petitioner's plea of not guilty as "just taking a flier" (R. 55). Moreover, the trial judge stated that, in his opinion, Petitioner's exercise of his constitutional right to plead not guilty, *Rideau* v. *Louisiana, supra* at 726, was frivolous, motivated by an improper desire to seek appellate review, and indicative of an attitude of unrepentance (R. 55-56). By thus excoriating Petitioner, the trial judge unconstitutionally penalized Petitioner for exercising his constitu-

tional rights, the trial judge clearly demonstrated his own bias and prejudice, and the trial judge deprived Petitioner of a fair hearing. See *United States* v. *Wiley,* 278 F.2d 500, 504 (7th Cir. 1960).

B. *Unreasonable inference of guilt drawn from silence.* The trial judge, in his capacity as sole fact-finder, stated that he had considered as evidence against Petitioner the "failure of the defendant to take the stand in his own defense" (R. 54). Thereafter, Petitioner's attorney explained that, as a result of taking alcohol and benzedrine, Petitioner had "no recollection of these events" (R. 55). This uncontradicted explanation left no room for an inference of guilt, and such an inference was impermissible and unfair. See *Stewart* v. *United States,* 366 U.S. 1; *Grunewald* v. *United States,* 353 U.S. 391. Nevertheless, the trial judge continued to insist that silence was evidence of guilt (R. 56). Because this insistence was arbitrary and unreasonable, see *United States* v. *Romano,* 86 Sup. Ct. 279; *Tot* v. *United States,* 319 U.S. 463, Petitioner was denied a fair hearing.

III.

Petitioner was denied a fundamental safeguard guaranteed every defendant in a criminal prosecution, state or federal—the right to reasonable notice of the charges upon which he was tried. Charged by indictment with having forged and uttered certain specifically described checks, Petitioner entered a plea of not guilty. At the commencement of trial, Petitioner's court-appointed attorney agreed that he would not contest the State's case. In the proceeding that followed, the State introduced *no* evidence in support of the specific charges contained in the indictment. Instead,

the State was permitted, over objection, to amend the indictment by changing the description of the checks upon which the charges were predicated. The checks introduced were substantially different from those described in the indictment. They bore different numbers and were payable for different amounts. One of the checks introduced was different with respect to name, amount, and name of payee.

In these circumstances, Petitioner was not apprised of the offenses upon which he was tried until after the trial had commenced. He was deceived and misled by the indictment filed. He was denied the opportunity to present a defense, to plead intelligently, and to have a fair hearing. Convictions obtained upon the amended charges are violative of the due process provision of the Fourteenth Amendment.

ARGUMENT

I.

Petitioner Was Unconstitutionally Precluded From Contesting the State's Case by Cross-Examination or by Other Means.

A. Petitioner Was Stripped of His Constitutional Right to Contest the State's Case by Cross-Examination or by Other Means.

"I would like to point out in no way am I pleading guilty to this charge" (R. 22) (emphasis added). This unequivocal statement by Petitioner, the entry of pleas of not guilty (R. 74, 77), and the assertions by the court below that Petitioner did not plead guilty (R. 79, 81) establish beyond cavil that Petitioner exercised the most fundamental constitutional right of an accused in a criminal case—the right

to plead not guilty, *Rideau* v. *Louisiana*, 373 U.S. 723, 726, the right without which all other constitutional rights in a criminal case would be a sham and a mockery. Because he did not plead guilty, Petitioner was entitled to all of the constitutional rights customarily granted a defendant in a criminal case including the fundamental right to contest the State's case by cross-examination or by other means. *Douglas* v. *Alabama*, 380 U.S. 415; *Pointer* v. *Texas*, 380 U.S. 400; *In re Oliver*, 333 U.S. 257, 273; *Snyder* v. *Massachusetts*, 291 U.S. 97, 105 (dictum). That Petitioner was stripped of this right is manifest from the record.

After Petitioner pleaded not guilty, his court-appointed (R. 12-13) attorney entered into an arrangement with the trial court and the State (which arrangement, as we argue below, was without Petitioner's consent and against his expressed wishes) that the State was required to prove no more than a prima facie case (R. 21-2). This arrangement, as explicitly stated by the trial judge and the court below, barred Petitioner from contesting the State's case by any means (R. 21-2, 79, 81) including the falsehood-exposing mechanism of cross-examination. See *Pointer* v. *Texas*, 380 U.S. 400, 404.

After the arrangement was made, there was a taking of testimony (we cannot fairly call it a trial). One of the State's witnesses, Ronald Keith Mitchell, did not testify in person. At the time of Petitioner's hearing, Mitchell was in an Ohio penal institution (R. 39). In spite of the fact that the record discloses absolutely no reason for the State's failure to produce Mitchell, the State offered as evidence against Petitioner the transcript of an extra-judicial interrogation of Mitchell (R. 39, 58-70). The transcript was tendered on the theory that Mitchell's statement was that

of a co-conspirator (R. 39). If the statement had been made during and in furtherance of a conspiracy involving Petitioner, it would have been admissible against him both under the general law of evidence, *Fiswick* v. *United States*, 329 U.S. 211, 217; McCormick, Evidence §244, at 521-22 (1954), and under the Ohio law of evidence. *Goins* v. *State*, 46 Ohio St. 457, 463, 21 N.E. 476, 478-79 (1889). However, because Mitchell's statement was not made until February 3, 1961 (R. 59), it could not have been made during and in furtherance of an alleged transaction which, according to the State's own evidence, ended about October 10, 1960 (R. 23, 27, 41, 43, 45, 61). Therefore, the statement was clearly inadmissible as hearsay, *Fiswick* v. *United States, supra; Sparf* v. *United States*, 156 U.S. 51, 56; *Neighbours* v. *State*, 121 Ohio St. 525, 529, 169 N.E. 839, 840 (1930), for the reason that "it secured to the state the advantage of the evidence of [Mitchell] that the defendant had participated in the crime, without the state incurring the risk incident to the cross-examination of [Mitchell]". *State* v. *Neighbours, supra* at 529, 169 N.E. at 840. This reason for inadmissibility is, of course, the very reason underlying the constitutional right to cross-examination. *Douglas* v. *Alabama*, 380 U.S. 415, 418-20. Consequently, not only was the statement inadmissible as hearsay, it was, more importantly, inadmissible on constitutional grounds.

When the statement was offered into evidence, Petitioner's attorney objected on the ground that Mitchell was available and that he should have been produced as a witness (R. 39). The objection was overruled and the statement was accepted into evidence (R. 39). The statement related to burglary, larceny, forgery, and uttering; it was the only "direct evidence" linking Petitioner to a breaking, an entry, and a theft; it was the only "evidence" that a

breaking and entry took place at night as required by Ohio Rev. Code §2907.10; and the trial judge specifically referred to the statement as evidence of Petitioner's guilt (R. 54). In view of these facts, the constitutional error in admitting the statement, *Douglas* v. *Alabama, supra; Pointer* v. *Texas, supra,* must be regarded as prejudicial. *Douglas* v. *Alabama, supra* at 419.

In addition to Mitchell's statement, there was testimonial evidence. However, because of the arrangement already referred to, not a single witness was cross-examined (R. 25, 38, 41, 42, 44, 48, 49, 52). Moreover, the trial court indicated that defense objections to testimony would be viewed with disfavor (R. 23). Bearing in mind that it was impossible to cross-examine Mitchell's erroneously admitted statement, the entirety of the State's case went untested. Although eighteen months had elapsed between the date of the alleged incidents and the date of the trial, there was not even an attempt to test the State's case either by counter-questioning or by the offering of evidence (R. 53).

The very absence of a contest makes it impossible for us to demonstrate that a contest would have proved fruitful. However, such a demonstration is not a prerequisite to an argument of prejudice. As this Court observed in *Alford* v. *United States,* 282 U.S. 687, 692:

> To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

See also *Rosenberg* v. *United States,* 360 U.S. 367, 371; *Jencks* v. *United States,* 353 U.S. 657, 667-8; LAW AND

TACTICS IN FEDERAL CRIMINAL CASES 195-6 (Shadoan ed. 1964). We conclude, therefore, that Petitioner was prejudicially stripped of his constitutional right to contest the State's case by cross-examination or by other means.

Our conclusion is not at odds with the decision below. The court did not hold that Petitioner's rights were preserved. Rather, it admitted that they were lost, but it held that Petitioner had agreed to the loss (R. 79, 81, 82). This holding is utterly unsupported (indeed, it is flatly refuted) by the record.

B. THE COURT BELOW ERRONEOUSLY HELD THAT PETITIONER HAD WAIVED HIS CONSTITUTIONAL RIGHT TO CONTEST THE STATE'S CASE BY CROSS-EXAMINATION OR BY OTHER MEANS.

The assertions by the court below that Petitioner waived his constitutional rights appear to involve three assumptions: (1) that, at the outset of the trial, Petitioner himself expressly agreed to give up his rights (R. 79, 81); (2) that Petitioner himself impliedly agreed to give up his rights by not accepting the trial court's offer of a jury trial (R. 82); and (3) that Petitioner's rights were waived by the unilateral conduct of his court-appointed attorney (R. 81-2). Not one of these assumptions finds an iota of support either in the record or in the federal case law. We consider first the assumption that the Petitioner expressly waived his rights.

At the beginning of the proceedings, Petitioner's attorney (and not Petitioner himself) stated that "this matter is before the court on a prima facie case" (R. 21). That the attorney did not intend his statement to constitute a waiver of cross-examination is apparent from the attorney's effort to reserve the right of cross-examination (R. 21). However,

the trial court stated that an agreement to a prima facie case would preclude both cross-examination of the State's witnesses (R. 21), and any other contest of the State's case (R. 21-2). We do not contend that this statement was unclear. To the contrary it was an explicit statement that Petitioner would be barred from asserting fundamental rights deriving from his plea of not guilty. If, at this point in the proceedings, Petitioner had affirmatively indicated that he was willing to relinquish the safeguards ordinarily granted a defendant who pleads not guilty, he could not now complain.[1] But he did not so indicate. Perceiving that he was about to lose his constitutional rights, he responded, "I would like to point out *in no way* am I pleading guilty to this charge" (R. 22) (emphasis added). Reason does not permit Petitioner's response to be construed as "an *intentional relinquishment or abandonment* of a known right or privilege," *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (emphasis added), amounting to a waiver of his constitutional rights. Petitioner's statement was not a manifestation of assent but a clear rejection of the arrangement suggested by his attorney. Indeed, it was viewed as a rejection by the trial judge who responded to Petitioner's statement with, "If you want to stand trial we will give you a jury trial" (R. 22). Beyond question, the record flatly refutes the assumption of

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[1] *Patton* v. *United States*, 281 U.S. 276, 286 (defendants "personally assented" to trial by eleven jurors); *Diaz* v. *United States*, 223 U.S. 442 (confrontation and right to be present; defendant expressly consented to trial *in absentia*); *Reynolds* v. *United States*, 98 U.S. 145 (confrontation; defendant procured the witness' absence); *Echert* v. *United States*, 188 F.2d 336 (8th Cir. 1951) (defendants expressly accepted a jury selected in their absence); *Burns* v. *Sanford*, 77 F. Supp. 464 (N.D. Ga. 1948) (defendant waived his right to confrontation by personally signing a stipulation of testimony); *United States* v. *Barracota*, 45 F. Supp. 38 (S.D. N.Y. 1942) (defendant Barracota voluntarily left the trial; defendant Crisci expressly consented to trial *in absentia*).

the court below that, at the outset of his trial, Petitioner expressly waived his rights.

Equally refuted by the record is the assumption that Petitioner impliedly gave up his rights by not accepting the trial court's offer of a jury trial. Petitioner had been in pre-trial confinement for over two months (R. 22). See Petition for Writ of Certiorari, p. 18. He had waived his State constitutional right to a jury apparently in order to obtain an earlier trial date (R. 22). Confronted with the trial court's statement about a jury trial, Petitioner *continued* to insist on his rights by stating, "I would like to be *tried* by this court" (R. 22) (emphasis added). The trial judge, heedless of the fact that Petitioner was insisting on his trial rights, then demanded that Petitioner choose either a "complete trial" (*i.e.*, a contested trial before a jury) or a "prima facie case" (*i.e.*, a non-contest hearing before the court) (R. 22). Petitioner's attorney (not the Petitioner himself) interjected, "Prima Facie, Your Honor, is all we are interested in" (R. 22), and the matter was abruptly terminated without further exploration of Petitioner's views (R. 22).

From the absence of further insistence by Petitioner, the court below concluded that Petitioner had intentionally relinquished his rights. This conclusion runs counter to the repeated statements by this Court and others that every reasonable presumption must be drawn against the waiver of constitutional rights and against acquiescence in the loss of fundamental rights, a presumption that is as vitally applicable to the instant case as it is to cases involving such other fundamental protections as the privilege against self-incrimination, *Escobedo* v. *Illinois,* 378 U.S. 478, 490; *id.* at 499 (dissenting opinion); *Smith* v. *United*

States, 337 U.S. 137, 150; the right to counsel, *Doughty* v. *Maxwell,* 376 U.S. 202; *Johnson* v. *Zerbst, supra;* the right to be present, *Evans* v. *United States,* 284 F.2d 393, 395 (6th Cir. 1960); and the right to be free from unreasonable search and seizure, *Judd* v. *United States,* 190 F.2d 649, 651 (D.C. Cir. 1951). See *Rucker* v. *United States,* 280 F.2d 623, 625 (D.C. Cir. 1960) (confrontation; *semble*). Indeed, neither the right to counsel nor the right to be present can have any real meaning if, as happened in the case at bar, an accused is stripped of his right to contest the State's case. *Cf. Julian* v. *United States,* 236 F.2d 155 (6th Cir. 1956).

Had Petitioner remained totally silent in the face of an affirmative and unequivocal waiver by his attorney of fundamental protections, it might be argued that he could not repudiate his attorney's conduct. In such a case, some courts would infer from the absence of objection either that Petitioner had waived his rights or that he had acquiesced in waiver.[2] Whether this inference is consistent with the strong presumption against waiver of constitutional rights need not be determined. Even if the inference is accepted, it does not support the opinion below for the reason that, in the case at bar, Petitioner *did* object. In no federal case that we have found has it even been remotely suggested that objection was irrelevant. To the contrary,

[2] *Diaz* v. *United States, supra* (confrontation; defense counsel introduced hearsay documents parts of which were favorable to defendant); *Wilson* v. *Gray,* 345 F.2d 282 (9th Cir. 1965), *cert. denied,* 86 Sup. Ct. 288 (confrontation; defense counsel agreed to the admissibility of hearsay documents); *Cruzado* v. *Puerto Rico,* 210 F.2d 789 (1st Cir. 1954) (confrontation; defense counsel agreed to trial on the transcript of co-defendant's trial; the transcript contained cross-examination). *But cf., People* v. *Nowak,* 372 Ill. 381, 24 N.E. 2d 50 (1939) (confrontation; defense counsel stipulated all of the State's case).

in many federal cases the court carefully pointed out that there was no objection, *Wilson* v. *Gray,* 345 F.2d 282, 287 (9th Cir. 1965), *cert. denied,* 86 Sup. Ct. 288; *United States* v. *Joseph,* 333 F.2d 1012, 1013 (6th Cir. 1964), *cert. denied,* 379 U.S. 915; *Cruzado* v. *Puerto Rico,* 210 F.2d 789, 791 (1st Cir. 1954), thereby emphasizing the importance of objection and hinting broadly that it would be impermissible to find a waiver in the face of an objection.

To hold, as the court below did, that Petitioner voluntarily relinquished his rights by not continuing to insist that they be preserved is to fly in the face of all federal decisional law. In the instant case, Petitioner had already objected twice (R. 22). If an accused who is an attorney need object but once, *Glasser* v. *United States,* 315 U.S. 60, 72, surely two objections should suffice in the case of an accused who is a layman. The conclusion of the court below that Petitioner both expressly and impliedly waived his rights is unsupported by the record. Indeed, as we asserted earlier, it is flatly refuted by the record.[3]

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[3] Even if Petitioner had personally assented to a prima facie case in response to the trial court's demand that he make up his mind (R. 22), the result would be unchanged. As noted above, Petitioner waived his state constitutional right to a jury apparently in order to obtain an earlier trial date and to avoid prolonged pre-trial confinement in the county jail (R. 22). This waiver was made pursuant to Ohio Rev. Code §2945.05 (1953), and it was beyond the power of the trial court to reject the waiver. *State* v. *Frohner,* 150 Ohio St. 53, 87, 80 N.E. 2d 868, 885 (1948). In response to Petitioner's statement that he was in no way pleading guilty, the trial court stated, "If you want to stand trial we will give you a *jury* trial" (R. 22) (emphasis added). In effect, the trial court erroneously told Petitioner that his only alternatives were (1) a contested trial before a jury with attendant delay and additional pre-trial confinement (R. 22) or (2) a no-contest hearing without a jury. That Petitioner did not adopt the second alternative is apparent from his statement "I would like to be *tried* by this court" (R. 22) (emphasis added). See dissenting opinion

The statement by the court below that "agreements, waivers and stipulations made by . . . counsel [of accused persons] in their presence . . are . . . binding and enforceable upon such persons. . . ." (R. 81-2), suggests, as the third assumption underlying the court's holding, that a waiver, binding on Petitioner, was effected by Petitioner's attorney. However, such an alternative is illusory. Constitutional rights are personal rights. If a suspect refuses to consent to an otherwise unconstitutional search, his attorney, if present, cannot properly authorize the search; if a defendant refuses to testify in his own behalf, his attorney cannot force him to the witness box; and if an accused wants to plead not guilty, his attorney cannot enter a guilty plea for him. Consequently, to say that a waiver by counsel is binding on the client is merely to rephrase the rule, considered above, that a court may, in some instances, infer from the accused's silence that he acquiesces in his attorney's conduct. Whatever the merits of the rule in a case involving silence, the rule can have no application in a case involving objection. *Cf. Glasser* v. *United States, supra.* Because the record in the case at bar abundantly demonstrates that Petitioner insisted on his trial rights, it was manifestly incorrect for the court below to conclude either that Petitioner had personally waived his rights or that counsel had effected a waiver for him. The judgment of the court below should be reversed.

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below (R. 87). But even if Petitioner had personally adopted the second alternative, the adoption would have been coerced by the erroneous threat of additional delay and confinement. Because the very essence of waiver is volition, *Moore* v. *Michigan*, 355 U.S. 155, 162-65, such an adoption or acquiescence could not constitutionally be taken as a waiver.

C. The Constitutional Right to Contest the State's Case by Cross-Examination or by Other Means Presents no Problem of Retrospective Application.

Although Petitioner's conviction became final before this Court decided *Douglas* v. *Alabama*, 380 U.S. 415, and *Pointer* v. *Texas*, 380 U.S. 400, there is no problem of retrospective application in the instant case. On the date of his trial, Petitioner had a *Fourteenth Amendment* due process right to contest the State's case by cross-examination of the State's witnesses. In *In re Oliver*, 333 U.S. 257, decided fourteen years before Petitioner's trial, this Court, in reversing a state conviction for contempt, observed that an accused's "right to examine the witnesses against him" is "basic in our system of jurisprudence." *Id.* at 273. A similar due process analysis was accorded the right to cross-examination in *Greene* v. *McElroy*, 360 U.S. 474, 496-97, decided almost three years before Petitioner's trial. But of even greater significance are the statements of Justices Harlan and Stewart, concurring in *Pointer*, that "a right of confrontation is 'implicit in the concept of ordered liberty,'" 380 U.S. at 408, and that the right "to cross-examine the prosecutor's living witnesses is 'one of the fundamental guarantees of life and liberty . . . .'" *Id.* at 410. We conclude, therefore, that, on the date of his trial, Petitioner had a Fourteenth Amendment due process right to contest the State's case by cross-examination of the State's witnesses.[4]

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[4] We are aware of the two unfortunate assertions in *Stein* v. *New York*, 346 U.S. 156, 195, *overruled on other grounds*, *Jackson* v. *Denno*, 378 U.S. 368, that there is no right of confrontation protected by the Fourteenth Amendment and that this Court so held in *West* v. *Louisiana*, 194 U.S. 258. However, these assertions should be rejected for three reasons: (1) They were based upon an incorrect reading of *West* v. *Louisiana*, *supra*. In *West*, this

Should this court choose to reach the question whether *Douglas* and *Pointer* apply retrospectively to all State criminal trials, the result we urge above would be unchanged. A consideration of the nature and purpose of cross-examination brings the instant case well within the rationale *for* retrospective application of *Tehan* v. *United States,* No. 52, U.S., Jan. 19, 1966, and *Linkletter* v. *Walker,* 381 U.S. 618.

In *Linkletter,* this Court held that because the search and seizure exclusionary rule had "no bearing on guilt," 381 U.S. at 638, non-application to certain cases would not jeopardize "the very integrity of the fact-finding process." *Id.* at 639. In *Tehan,* an identical analysis was accorded the no-comment rule of *Griffin* v. *California,* 380 U.S. 609. However, the right involved in the instant case—the con-

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Court held that the *Sixth Amendment* rights of confrontation and cross-examination were not applicable to state trials. It did not hold that there was no *Fourteenth Amendment* right. Indeed, it undertook a Fourteenth Amendment analysis of the problem and it held that the right had not been violated by the introduction into evidence of a deposition taken in the accused's presence and with cross-examination. That this holding is also sound Sixth Amendment doctrine is apparent from *Douglas* v. *Alabama, supra* at 418; *Pointer* v. *Texas, supra* at 407; *Motes* v. *United States,* 178 U.S. 458, 474. (2) The assertions in *Stein* were unnecessary to the decision. In *Stein* the prosecution introduced into evidence the confessions of two co-defendants who were then being tried with one Wissner. Because the confessions referred repeatedly to Wissner and because the trial court refused to order the references deleted, the specific issue concerned the efficacy of the court's instruction to the jury that the confessions were not admissible against Wissner. See Brief for Wissner, p. 17, *Stein* v. *New York, supra.* Accordingly, there really was no issue of confrontation or cross-examination. (3) The assertions in *Stein* were made without regard to *In re Oliver, supra;* they must be treated as tacitly overruled by *Greene* v. *McElroy, supra;* and they must be regarded as tacitly disavowed in the concurring opinions in *Douglas* and *Pointer.*

stitutional right to contest the State's case by cross-examination—is manifestly related to the integrity of the fact-finding process because it is the primary mechanism for "exposing falsehood and bringing out the truth in the trial of a criminal case." *Pointer* v. *Texas, supra* at 404. It is, therefore, an "essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Id.* at 405. Accordingly, if there is a problem of retrospective application, it should be resolved in favor of application just as it was resolved in favor of application in cases involving an indigent's right to counsel (which right, without a right to contest the State's case would, indeed, be hollow), an indigent's right to a trial transcript, and an accused's right to be free from coercive police interrogation practices. See Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 79-84 (1965).

Resolution of the problem in favor of application will (if we prevail on our argument that Petitioner's rights were unconstitutionally violated) result in Petitioner's release. However, the State will not be barred from re-trying him. In any subsequent trial we must anticipate that the constitutional standards of confrontation and cross-examination will be complied with and their underlying purposes served. Hence, the instant case is beyond the scope of the statement in *Linkletter, supra* at 637, that "we cannot say that [the purpose of the exclusionary rule] would be advanced by making the rule retrospective." See also *Tehan* v. *United States, supra* at 8.

Moreover, resolution of the problem in favor of application will have no deleterious effect on the administration of justice. In *Linkletter, supra* at 637-38, this Court,

stressing the fact that the exclusionary rule is unrelated to guilt, deemed it unwise to impose upon the administration of state criminal justice the burden of "hearings [which] would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated." In the instant case, however, no special hearing would be required. But even if a special hearing were required, the rights to confrontation and cross-examination are so essential to the accuracy of the guilt-finding process, *Pointer* v. *Texas, supra* at 404, that any burden would be more than justified.

Finally, resolution of the problem in favor of application would in no way penalize the State for relying on prior decisions of this Court. Compare *Tehan* v. *United States, supra* at 6-7; *Linkletter* v. *Walker, supra* at 636-37. In the instant case there is no counterpart to *Twining* v. *New Jersey,* 211 U.S. 78; *Adamson* v. *California,* 332 U.S. 46; or *Wolf* v. *Colorado,* 338 U.S. 25, upon which the State could have relied. Because we have already made this point in our Fourteenth Amendment argument, we will not repeat it here. We do note, however, that the court below *did not rely* on any prior decision by this Court. The court below held not that the Sixth Amendment rights were inapplicable to a state proceeding, but that the Petitioner had waived his rights. It follows, therefore, that the reliance aspect of *Tehan* and *Linkletter* has no application to the case at bar. However, even if there had been a counterpart to *Twining, Adamson,* or *Wolf* in the case at bar and even if the court below had relied on it, the result should be no different. As we read *Tehan* and *Linkletter,* the significant questions are whether the constitutional right involved serves to assure the integrity of the guilt-

finding process and whether the purposes underlying the constitutional right can be fulfilled by retrospective application. Because the answer to each of these questions in the instant case is "yes," the make-weight of reliance is irrelevant. Consequently, if this Court deems it necessary to decide the problem of retrospective application, it should decide in favor of application.

II.

Petitioner's Hearing Was Fundamentally Unfair. The Trial Judge Manifested Prejudice by Pre-judging the Case and, in Imposing Sentence, by Excoriating Petitioner for Exercising His Constitutional Right to Plead Not Guilty. Moreover, the Trial Judge Arbitrarily and Unreasonably Inferred From Petitioner's Silence That Petitioner Was Guilty.

A. The Trial Judge (the Trier of Fact) Manifested Prejudice by Pre-judging the Case and, in Imposing Sentence, by Excoriating Petitioner for Exercising His Constitutional Right to Plead Not Guilty.

At the outset of Petitioner's hearing, the trial judge stated his understanding of the scope and effect of a prima facie case:

> The Court: Ordinarily in a prima facie case . . . the prima facie case is where the defendant, not technically or legally, in effect *admits his guilt* and wants the state to prove it.
>
> Mr. Ergazos: That is correct.
>
> (R. 21-2) (Emphasis added.)

Thereby the trial court pre-judged the case and stripped Petitioner of his undeniable constitutional right to a fair hearing before an impartial and unbiased judge. *In re Murchison*, 349 U.S. 133; *Tumey* v. *Ohio*, 273 U.S. 510.

Had the case at bar been tried to a jury it might be argued that a judge's private expression of guilt, not communicated to the jury, was not inconsistent with fundamental fairness. *Sheppard* v. *Maxwell*, 346 F.2d 707 (6th Cir. 1965), *cert. granted*, 86 Sup. Ct. 289. But the case at bar was not tried to a jury. At the time he asserted that Petitioner had admitted guilt, the trial judge knew that a jury had been waived and that he, the trial judge, would be the trier of fact (R. 20-21). It was, therefore, essential to a fair trial that he be free from prejudice and that he abjure "a fixed anticipatory judgment." *State ex rel. Pratt* v. *Weygandt*, 164 Ohio St. 463, 469, 132 N.E. 2d 191, 195 (1956). Any bias or prejudice entertained by him could not conceivably have been neutralized by the fairness of other fact-finders because there were no other fact-finders.

The trial judge's statement that Petitioner had admitted guilt was, for all purposes, equivalent to an anticipatory and constitutionally impermissible statement by all twelve jurors in a jury trial that the accused was guilty. *Juelich* v. *United States*, 214 F.2d 950 (5th Cir. 1954). The belief of the sole fact-finder in the case at bar that Petitioner had admitted his guilt in open court was more subversive of fair trial than the publicized information in *Irvin* v. *Dowd*, 366 U.S. 717, 725-26, that the defendant had *offered* to plead guilty; it was more subversive of fair trial than the opinion of eight jurors in *Irvin* that the defendant was guilty, *id.* at 727-28; it was more subversive of fair trial than the televised extra-judicial confession in *Rideau* v. *Louisiana*,

373 U.S. 723, 725, which had been seen by three jurors; it was more subversive of fair trial than the judge's financial interest in *Tumey* v. *Ohio,* 273 U.S. 510, 532, which interest was not shown to have been attended by preconception of guilt; it was more subversive of fair trial than the impermissible evidence of propensity in *Maestas* v. *United States,* 341 F.2d 493, 495-96 (10th Cir. 1965); *Lane* v. *Warden,* 320 F.2d 179, 186 (4th Cir. 1963), *cert. denied,* 368 U.S. 993; and *Paschal* v. *United States,* 306 F.2d 398, 399-401 (5th Cir. 1962); see also *Rogers* v. *United States,* 304 F.2d 520, 523 (5th Cir. 1962); *McFadden* v. *United States,* 63 F.2d 111 (7th Cir. 1933); and it was at least as subversive of fair trial as the judge-grand jury procedure in *In re Murchison,* 349 U.S. 133. The constitutional error is manifest.

Equally manifest is the constitutionally impermissible prejudice displayed by the trial judge during the sentencing procedure. Petitioner's most fundamental right in a criminal case was the right to plead not guilty. See *Rideau* v. *Louisiana,* 373 U.S. 723, 726. He exercised that right (R. 74, 77). Then, during the sentencing procedure, the trial judge brazenly stigmatized the exercise of that right as "just taking a flier" (R. 55). It was apparently the trial judge's position that the constitutional right to plead not guilty was to be exercised sparingly; that it was to be exercised only if an accused had reason to expect an acquittal; that the Petitioner could not reasonably have expected an acquittal (given that the sole fact-finder had pre-judged Petitioner's guilt and that Petitioner had been stripped of his right to contest the State's case, this assuredly was true); and that his exercise of a fundamental right was therefore frivolous, motivated by an improper desire to seek appellate review, and indicative of an attitude of un-

repentance (R. 55-56). Thereupon the trial judge imposed multiple sentences to imprisonment for a total of 3-60 years, some of the sentences to run consecutively (R. 14-17).

By excoriating Petitioner for exercising his constitutional rights, the trial judge unconstitutionally penalized Petitioner, *cf. United States* v. *Wiley*, 278 F.2d 500, 504 (7th Cir. 1960); *People* v. *Moriarty*, 25 Ill. 2d 565, 185 N.E. 2d 688 (1962), and thereby served notice on the whole world that the assertion of constitutional rights would, in his courtroom, be met with judicial hostility. We do not urge that the trial judge should have been soft or tender-hearted. We do insist that, at the very least, he should have been impartial, detached, and neutral. But neutral he was not. Upon hearing his harangue, Petitioner must have felt like the football player who found that he had been clipped by the referee.

Petitioner had been stripped of almost every constitutional right preserved by a plea of not guilty. In fact he was left with but the hollow shell of his plea. It is a supreme irony of the instant case that even the shell was then thrown in Petitioner's face.

That the trial judge found Petitioner not guilty on counts seven and eight (R. 53) is irrelevant and can in no way mitigate the prejudice demonstrated by the trial judge both in his capacity as sole fact-finder and in his capacity as judge. The findings were made before, and had no relation to, the demonstration of prejudice during the sentencing procedure (R. 55-56). Moreover, the findings were compelled by the peculiar arrangement already referred to. Pursuant to the arrangement, the trial judge was required to acquit if, as happened (R. 53), there was a total failure

of proof by the State. That he did acquit upon total failure of proof establishes only that he was willing to adhere to the arrangement. Nor is it necessary for us to demonstrate that the result of the instant case necessarily would have been different absent prejudice. *Tumey* v. *Ohio*, 273 U.S. 510, 535. Petitioner had an absolute constitutional right to a fair hearing before an unbiased fact-finder. "To perform its function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136. See also *Rideau* v. *Louisiana*, 373 U.S. 723, 727; *Smith* v. *United States*, 360 U.S. 1, 17 (concurring opinion). Because Petitioner was denied not only the appearance of justice but also the substance of it, the judgment of the court below should be reversed.

B. The Trial Judge (the Trier of Fact) Arbitrarily and Unreasonably Inferred From Petitioner's Silence That Petitioner Was Guilty.

In announcing his findings of guilt, the trial judge, the trier of fact, stated that he had considered as evidence against Petitioner the "failure of the defendant to take the stand in his own defense" (R. 54). Thereafter, Petitioner's attorney told the trial judge that, at the time of the alleged incidents, Petitioner had been taking benzedrine, that he had been drinking heavily, and that he had "no recollection of these events" (R. 55). The trial court had absolutely no basis for rejecting this uncontradicted (R. 55) explanation. Nevertheless, the trial court did reject it and reiterated that silence was evidence of guilt (R. 56).

Whether or not guilt is a reasonable inference to be drawn from silence, the inference cannot constitutionally be called to the attention of the fact-finder. *Howell* v. *Ohio*,

381 U.S. 275; *Griffin* v. *California,* 380 U.S. 609. Regrettably, this Court's decision in *Tehan* v. *United States,* No. 52, U.S., Jan. 19, 1966, precludes us from urging that the no-comment rule of *Griffin* be applied to the instant case. However, *Tehan* cannot be read as barring inquiry into the reasonableness and fairness of the inference.

The inference of guilt drawn by the trier of fact in the case at bar was unreasonable and unfair. Indeed, it was far more destructive of fair trial than the conduct of the prosecutor in *Stewart* v. *United States,* 366 U.S. 1, and *Grunewald* v. *United States,* 353 U.S. 391. In each of these cases, this Court deemed unfair a prosecutor's cross-examination of the defendant regarding his failure to testify in a prior proceeding. Each of these cases involved a jury trial, and it was impossible for defendant to demonstrate that the jury had considered silence as evidence of guilt. In the instant case, however, the trier of fact stated explicitly that he had considered silence as evidence of guilt. In *Stewart* and *Grunewald,* silence was at least consistent with guilt, and in *Grunewald,* the jury was instructed that silence related only to credibility and not to guilt. 353 U.S. at 417. In the instant case, however, there was an explanation for silence. Not only was the explanation consistent with innocence, it left no room for an inference of guilt. The explanation was in no way contradicted or impeached by the State. There was no reasonable basis for rejecting it.

If, by statute, the Ohio legislature had provided that the defendant's failure to testify created an inference of guilt even though silence derived from alcoholic or narcotic amnesia, the statutory inference could not be upheld as reasonable and fair. *United States* v. *Romano,* 86 Sup. Ct. 279;

Tot v. *United States,* 319 U.S. 463. The inference drawn by the fact-finder in the case at bar is equally unreasonable and unfair, and the judgment of the court below should be reversed.

III.

Petitioner's Hearing Was Fundamentally Unfair. Petitioner Was Denied Fair and Reasonable Notice of the Charges on Which He Was Tried and He Was Denied Fair and Reasonable Opportunity to Defend Against Those Charges.

Petitioner was charged by indictment with having forged and uttered four separate instruments. Each of the instruments was described as a check. Each was specifically identified by number, amount payable, date written, and names of maker and payee. At trial, only three instruments were produced by the State. None matched the specific descriptions of the checks set out in the various counts of the indictment. The check introduced in support of counts one and two bore a different number and was made payable for a different amount than the check described in those counts. The identifying number of the check set forth in counts three and four was different from that on the check introduced in support of those counts. The check introduced as evidence of the offenses charged in counts five and six bore virtually no resemblance to that described in the indictment. It was written for a different amount identified by a different number, and made payable to a different payee. No check whatsoever was produced by the State to establish the offenses charged in counts seven and eight, and the court was compelled to acquit Petitioner of the charges contained in those counts.

Despite the State's failure to establish Petitioner's guilt of any of the specific offenses charged in the indictment, Petitioner was convicted. His convictions were rendered possible solely by the willingness of the trial court, over objection, to permit the State to amend the indictment to conform to its proof. By permitting the State to try Petitioner for offenses other than those with which he was charged, the trial court denied Petitioner a fundamental protection guaranteed by due process of law—the right to notice of the charges against him. *Cole* v. *Arkansas,* 333 U.S. 196. The right of an accused in all criminal prosecutions "to be informed of the nature and cause of the accusation," specifically guaranteed by the Sixth Amendment, has been described by this Court as one of the "safeguards essential to liberty in a government dedicated to justice under law." *Id.* at 202. It is a safeguard constitutionally required in all criminal prosecutions, state or federal. *In re Oliver,* 333 U.S. 257, 273.

The Supreme Court of Ohio did not suggest in the instant case that the requirement of notice was inapplicable. It held, however, that the requirement was satisfied by advising the accused of the name of the crime with which he was charged:

> The indictments presently before us were for forgery and uttering a forged instrument. They were complete on their face and properly charged the offense in issue. An amendment to an indictment for forgery or uttering, which merely changes the check numbers, amounts or the names of the payee as set forth in the indictment, is a matter of form, not of substance, and in no way affects the nature or identity of the offense as charged (R. 78).

It is impossible to reconcile this view with the primary function of an indictment or any other pleading by the State. An indictment must sufficiently apprise the defendant of the charges against him to enable him to prepare to meet those charges. *Russell* v. *United States,* 369 U.S. 749, 763; *Cole* v. *Arkansas, supra.* To achieve that purpose, it is not sufficient for the indictment to charge an offense in generic terms; "'but it must state the species,—it must descend to particulars.'" *United States* v. *Cruikshank,* 92 U.S. 542, 558. Here, the indictment did "descend to particulars." But when the trial started, the particulars were immediately abandoned. Petitioner was tried on charges drastically different from those contained in the indictment. The vulnerability to constitutional attack of convictions for offenses not charged is apparent. "Conviction upon a charge not made would be sheer denial of due process." *DeJonge* v. *Oregon,* 290 U.S. 353, 362.

It is as much a violation of due process to try a man on charges never made as it is to affirm his conviction on charges never tried. *Cole* v. *Arkansas, supra.* The variance between indictment and proof is no less offensive where the evidence introduced is relevant to particular offenses completely different from those charged, than it is where the jury is permitted broader scope than an indictment would warrant. *Stirone* v. *United States,* 361 U.S. 212. The disadvantage to the accused arising from amendment at trial of the specific charges of the indictment is at least as great as that which arises from inadequate information in the indictment. *Russell* v. *United States, supra.*

Amendment of an indictment for forgery and uttering by changing the description of the instrument allegedly

forged and uttered would obviously be impermissible in a federal court. See *Ex Parte Bain,* 121 U.S. 1. One basis for the federal rule is the Fifth Amendment requirement of indictment by grand jury without which requirement the rights of an accused would be "at the mercy or control of the court or prosecuting attorney." *Id.* at 13. Were this requirement the sole basis for prohibiting a substantial amendment of a federal indictment, application of a similar prohibition to state prosecutions would raise a serious question. See *Hurtado* v. *California,* 110 U.S. 516. But the Fifth Amendment is not the sole basis for the federal rule. *Stirone* v. *United States, supra.* A second, and equally important basis, valid in state as well as federal prosecutions, is reasonable notice. "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence . . . " *In re Oliver,* 333 U.S. 257, 273. Reasonable notice is not afforded where the prosecution is permitted to charge one offense and prove another. *Stirone* v. *United States, supra.* The right of the accused "to be heard in his defense" is devoid of any significance if the accused is not afforded reasonable opportunity to prepare his defense. *Powell* v. *Alabama,* 287 U.S. 45, 71. Meaningful preparation is hardly possible where the accused is not apprised of the specific charges he must meet until after his trial has commenced.

The constitutional requirement of reasonable notice and an opportunity to be heard described in *Holden* v. *Hardy,* 169 U.S. 366, 389, as one of the "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard," received no consideration from the court below. Relying upon

§2941.30 of the Ohio Revised Code, which allows amend ment of an indictment "provided no change is made in th name or identity of the crime charged," the court con doned the revision of the indictment allowed at trial. Sub stitution of descriptions of checks radically different fron those contained in the indictment was deemed not to affec "the nature or identity of the offense charged." Thus, fo purposes here relevant, the court has read the word "iden tity" out of the statute. So long as the name of the offens charged remains the same, any amendment would be per missible. The court's holding ignores the principle that statutory description of an offense "must be accompanie with such a statement of the facts and circumstances a will inform the accused of the specific offense, coming un der the general description, with which he is charged." *United States* v. *Hess,* 124 U.S. 483, 487; see *Skelley* v *United States,* 37 F.2d 503 (10th Cir. 1930); *United State* v. *Strauss,* 285 F.2d 953 (5th Cir. 1960). To permit whole sale amendment of criminal charges, limited solely by th requirement that the name of the offenses remain un changed, does outrage to the fundamental rule of fairnes applicable to any pleading which initiates a criminal pro ceeding—that the pleading apprise the accused, with rea sonable certainty, of the specific charges he must be pre pared to meet. *United States* v. *Simmons,* 96 U.S. 360.

Petitioner was not merely denied adequate notice of th charges upon which he was to be tried; he was affirmatively misled by the indictment filed. The indictment filed did set forth the specific facts upon which the charges were predicated. Had it not set forth those specific facts, Peti tioner would have been entitled to a bill of particulars a a matter of right pursuant to §2941.07 of the Ohio Revise

Code. He did not request a bill of particulars, nor did he need one. Had he been tried upon the offenses charged, he could not now complain of inadequate notice. But he was not tried upon those charges. Any preparation undertaken to meet those charges would have been of little value in meeting the amended charges. The injustice of the situation is enormously magnified by the peculiar circumstances of the trial. Despite Petitioner's unequivocal assertion, "I would like to point out in no way am I pleading guilty," the trial court considered that Petitioner had admitted his guilt by entering into an arrangement whereby the State's case was not to be contested (R. 21). What crimes did Petitioner admit by entering into the arrangement? If he admitted the offenses charged in the indictment, his admission was wholly uncorroborated. The state offered no evidence to demonstrate that Petitioner had committed those offenses. Apparently, then, the trial court assumed that Petitioner admitted his guilt of certain offenses bearing the same name as those charged in the indictment.

The extreme injustice of the situation is even more apparent when examined in the context of the position taken by the Supreme Court of Ohio. That court viewed the arrangement entered into by Petitioner's court-appointed attorney as "similar to the plea of *nolo contendere* with an added condition that the state prove the prima facie case" (R. 79). An assumption that the attorney acted intelligently must rest upon the further assumption that he knew the State could not prove the offenses charged; if he believed the State could "prove the prima facie case" in an uncontested proceeding, there could be no rational explanation of his waiver of his client's most fundamental constitutional rights. Indeed, the State could not "prove the prima

facie case." But the court did not require it to do so. After obtaining all the advantages derived from the no-contest plea, the State was allowed to prove offenses other than those to which that plea was deemed to have been entered.

In *Cole* v. *Arkansas, supra,* 196 U.S. at 201, this Court stated the basic proposition upon which Petitioner rests his plea:

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in all courts, state or federal.

Petitioner was denied "notice of the specific charge" upon which he was tried. He was denied "a chance to be heard in a trial of the issues raised by that charge." He was denied the opportunity to prepare to meet the charges upon which he was tried and to participate effectively in the fact-finding process of a trial. He was denied information essential to enable him to plead intelligently. He was denied the most fundamental safeguards essential to a fair trial. He was denied "due process of law" within the meaning of the Fourteenth Amendment. The judgment of the court below should be reversed.

Conclusion

The function and essential elements of a criminal trial have been aptly described by Judge Thurman Arnold:

> The significance of a criminal trial in all civilized countries goes far beyond the question of public order and the enforcement of law. It embodies the notion that every man, however lowly and however guilty he

may be, is entitled to a fair and impartial trial in which he must be presumed to be innocent. What is underneath the idea of a fair trial and what are its basic elements? The first premise is that the judge must be impartial. The second is that the accused has the right to have counsel. The third is that the judgment must be based on the evidence before the tribunal and that the accused is entitled to confront and cross-examine the witnesses who testify against him. *The Criminal Trial as a Symbol of Public Morality* in CRIMINAL JUSTICE IN OUR TIME 140 (Howard ed. 1965).

Petitioner's trial was empty of those essential elements of fairness. He was not presumed innocent. He was tried by a judge who had determined his guilt before the trial even began. Although an attorney was appointed to represent Petitioner, the attorney surrendered the right to present Petitioner's position on a fundamental question of guilt or innocence at the very inception of the trial. Petitioner was denied the right to confront and cross-examine the witnesses against him. In these circumstances, the "tremendous psychological need for the appearance of justice," *ibid.*, was left entirely unsatisfied. The need for the reality of justice was equally unfulfilled.

Wherefore, it is respectfully urged that the judgment below be reversed.

LAWRENCE HERMAN
GERALD A. MESSERMAN
Counsel for Petitioner

February 1, 1966

Supreme

[redacted]

vs.

MARTIN A. JANIS, DIRECTOR OF THE [redacted] PARTMENT OF MENTAL HYGIENE [redacted] RECTION,

[redacted]

ON WRIT OF CERTIORARI TO THE [redacted] COURT OF THE STATE OF [redacted]

BRIEF FOR THE RESPONDENT.

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ERRATA SHEET

JAMES BROOKHART V. JANIS
NO. 657

Certain errors in citations appear in the index to Respondent's brief. The correct citations are as follows:

Arnold v. United States, (9th Cir. 1964) 336 F. 2d 347 . . . . . .
Brown v. Mississippi, 297 U.S. 278 . . . . .
Cohen v. Hurley, 366 U.S. 117 . . . . . .
Lutwak v. United States, 344 U.S. 604 . . .
Delete McFadden v. United States
Add Paschal v. United States, (5th Cir. 1962) 306 F. 2d 398 . . . . . .
Delete Post v. Cunningham
Add Root v. Cunningham, (4th Cir. 1965) 344 F. 2d 1 . . . . . .
United States v. Denny, (7th Cir. 1947) 165 F. 2d 668 . . . . . .
Delete United States v. Haskins
Add United States v. Crowder, (6th Cir. 1965) 346 F. 2d 1 . . . . . .
Delete Article I, Section 19, Constitution of Ohio (1851)

The following errors appear in the body of the brief:

At page 34 note 29 should read:
As defined above, see notes 7, 8 and 9. .
At page 55, line 9, the citation Rogers v. United States should read Paschal v. United States, (5th Cir. 1962) 306 F. 2d 398. . .
At page 55, line 16, the citation McFadden v. United States should read Rogers v. United States, (5th Cir. 1962) 304 F. 2d 520. . . . . .

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 657

JAMES BROOKHART,

Petitioner,

vs.

MARTIN A. JANIS, DIRECTOR OF THE OHIO DEPARTMENT OF MENTAL HYGIENE AND CORRECTION,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO
BRIEF FOR THE RESPONDENT

Opinion Below

The opinion of the Supreme Court of the State of Ohio (R. 78-88) is reported at 2 Ohio St. 2d 36, 205 N.E. 2d 911 (1965).

Questions Presented

I.

Does the trial court by allowing the State to amend certain counts of an indictment for forgery and uttering and publishing forged checks by making changes, in the numbers of three checks, the amounts on two of them and the

name of the payee on one, constitute such an amendment as would change the nature, name, or identity of the offense charged and thereby cause a defendant to be tried on an indictment not returned by the grand jury; and did the Supreme Court of Ohio err in finding that such amendments were those of form only and were allowable under Ohio law?

II.

Does a defendant in a criminal prosecution waive his right to cross-examine witnesses against him when his counsel, in defendant's presence, waives such right and where, under the circumstances, such waiver was not arbitrary or fatuous and where the defendant, at no time, in any manner, specifically objects to such waiver and who makes no such general objection to his counsel's acts as would be tantamount to a request for his dismissal?

III.

Does a defendant in a criminal prosecution have a constitutional right to confront a witness against him, where the testimony of the witness is under oath, the right to cross-examine the witness has been waived, the authenticity of the statement is not challenged and the testimony amounts to a statement against interest?

IV.

Did the Supreme Court of Ohio err in finding that the trial judge had conducted a fair, impartial, and unprejudiced trial when, based upon a record of the trial which disclosed that after a plea of not guilty, a pretrial colloquy was held between the trial court, counsel and Petitioner during which the court likened a *prima facie* case, which had been proposed by defense counsel, to one in which

"the defendant, not technically or legally, in effect admits his guilt and wants the State to prove it" and further that under such procedure the prosecution would only have to introduce sufficient proof to establish the guilt of the Petitioner and that cross-examinaton of State witnesses would not be permitted; after which Petitioner interjected that "in no way am I pleading guilty" and the court then offered to allow him to withdraw his waiver of jury trial and have a jury trial, which offer was rejected by Petitioner who then said, "I would like to be tried by this Court"; after which the court then told Petitioner he would have to decide if he wanted a *prima facie* case or a full trial and defense counsel replied, "Prima facie, Your Honor, is all we are interested in."†

STATEMENT

In an eight-count indictment filed in the Court of Common Pleas of Stark County, Ohio, on March 3, 1961, Doris Mae Jones, Ronald K. Mitchell, and Petitioner were charged with four counts of forgery[1] and four counts of uttering forged instruments[2] (R. 5-9). In a second indictment filed on the same day, Petitioner and Ronald K. Mitchell were charged with breaking and entering[3] and grand larceny[4] (R. 10-11). When arraigned on January 29, 1962, Petitioner entered pleas of not guilty to all charges. Two days later, counsel was appointed to represent Petitioner (R. 12-13).

On March 23, 1962, after Petitioner's co-defendants had been convicted, the indictments in which Petitioner was named were consolidated for trial, written waivers of jury

1. Ohio Revised Code, Section 2913.01 (1953).
2. *Ibid.*
3. Ohio Revised Code, Section 2907.10 (1953).
4. Ohio Revised Code, Section 2907.20 (1953).

trial were entered, and Petitioner was tried by the court (R. 20-21). Petitioner was found guilty on three counts of forgery, three counts of uttering, one count of breaking and entering, and one count of grand larceny. Consecutive sentences of one to twenty years were imposed in each of the forgery counts to run concurrently with sentences on all other counts (R. 13-19). Petitioner did not file a motion for a new trial.

On June 27, 1962, the Petitioner filed a Notice of Appeal and a Motion for Leave to Appeal in the Fifth District Court of Appeals. This motion was overruled and appeal denied December 29, 1962. No appeal was sought in the Ohio Supreme Court.

On October 15, 1964, Petitioner filed a petition for a Writ of Habeas Corpus in the Supreme Court of Ohio (R. 13). He contended only that his confinement was in violation of the Constitutions of the United States and of the State of Ohio. He made no allegations as to the manner in which his rights had been violated. A Return of Writ was filed by the Respondent setting forth the judgment of conviction and sentence upon which Petitioner was being held in the London Correctional Institution (R. 4). On November 24, 1964, a hearing was held by the Master Commissioners of the Supreme Court of Ohio. At the hearing Petitioner contended that, at his trial, he had been denied the right to confront and cross-examine witnesses, that he had been tried upon charges other than those contended in the indictments returned against him, and that he had been denied reasonable notice of the charges ultimately tried. In answer to these allegations Respondent introduced a transcript of the proceedings which had resulted in Petitioner's conviction (R. 72).

The transcript disclosed the following: At the commencement of the proceedings the court inquired of defense counsel if both indictments were to be tried together and having received an affirmative answer then advised Petitioner that he had a right to a jury trial and asked him if he so understood. Petitioner indicated that he did so understand (R. 20). He also indicated that he had signed waivers of jury trial and acknowledged his signature thereon (R. 21).

Then followed a colloquy between the court and counsel in the presence and hearing of the Petitioner (R. 21-22). The significant parts of this conversation disclosed that Petitioner's counsel introduced the fact that the matter was before the court on a *prima facie* case (R. 21). It further disclosed that Petitioner was particularly attentive and aware of the proceedings that were taking place. When, after the court had likened a *prima facie* case to one wherein the Defendant, not technically or legally, in effect admits his guilt, but wants the State to prove it, Petitioner immediately interjected, "I would like to point out in no way am I pleading guilty to this charge" (R. 22). After the court again had offered to give him a jury trial, Petitioner indicated that he "would like to be tried by this court." The court then advised him to make up his mind whether he required a *prima facie* case or a *complete trial* of it. Defense counsel replied, "Prima facie, Your Honor, is all we are interested in" (R. 22). No objection to the procedure was made by Petitioner, who by then knew that this procedure precluded the cross-examination of witnesses. This fact also is borne out by his allegation in his petition in this court "that this [the fact that he was not confronted with his accusers and that his counsel was not allowed to cross-examine witnesses] arose because of his trust in his court appointed attorney * * *".[5]

5. Page 5, Petition for Writ of Certiorari.

At the outset the prosecution waived opening statements. The prosecutor did indicate, however, that "the State of Ohio will prove each and every material allegation necessary in those particular cases [all counts of both indictments] by witnesses", to which the court interposed "*there is no question the court will require that*" (R. 22). (Emphasis supplied.)

During the course of the trial six exhibits were offered in evidence. Exhibits "A", "B", and "C" were checks, "D" was a copy of a check, "E" was a transcribed sworn statement of Ronald Keith Mitchell, a co-defendant who theretofore had pleaded guilty to the charges and who, at the time, was incarcerated in the Ohio State Reformatory and who was not presented as a witness (R. 52) and "F" was a letter written by the Petitioner to the Stark County Prosecuting Attorney and a reply thereto (R. 49). Exhibits "D" and "F" were not admitted in evidence (R. 53 - R. 50). All others were admitted over defense's objection (R. 53-R. 39).

During the progress of the trial the prosecution was allowed to amend the indictments in six counts to conform to the proof. The first and second counts were amended by substituting the check number 361 for 364 and the amount of the check $57.58 for $57.82 (R. 24). The third and fourth counts were amended by substituting the check number 367 for 364 (R. 26). The fifth and sixth counts were amended by substituting the check number 374 for 364 and the amount of the check from $57.82 to $72.63 (R. 26) and later to substitute the name of the payee, James Brookhart for Jimmy Cox (R. 52).

Defense counsel objected to the admission of Exhibit "E" for the reason that the party, a co-conspirator who had given the statement, should be produced. In response to a question of the court, "that you are not denying the state-

ment", counsel answered, "No we are not denying the statement but we are objecting to it at this time" (R. 39). He did not state upon what grounds his objection was predicated.

At the conclusion of the State's case the court dismissed counts seven and eight of the forgery and uttering indictment for failure of proof. It then overruled a defense motion to dismiss all other counts (R. 53), and found Petitioner guilty as charged except as to counts seven and eight on the forgery and uttering indictment, and on both counts of the burglary and larceny indictment (R. 54). In response to a question of the court as to whether he had anything to say why judgment should not be pronounced, Petitioner answered, "Nothing, Your Honor" (R. 54).

The sentences on each count of forgery (1-20 years) was pronounced to run consecutively, the sentences on all other counts to run concurrently therewith (R. 56).

Upon the statements made by the Petitioner at a hearing and the record of proceedings in the trial court, the Master Commissioners recommended that the Writ be denied (R. 74-R. 76). On March 31, 1965, the Supreme Court of Ohio denied the Writ; two judges dissented.[6] It is from the Ohio Supreme Court's order remanding Petitioner to custody that the petition herein was sought and was granted.

Summary of Argument

I.

Petitioner was denied no fundamental right—the right to reasonable notice of the charges upon which he was tried. The indictment for forgery and uttering and publishing forged checks contained each and every element of the offenses charged with such definiteness as to enable him to

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6. *Brookhart v. Haskins*, Superintendent, 2 Ohio St. 2d 36 (R. 77—R. 88).

present a defense thereto and to preclude a further prosecution for the same offense. The variations between the counts in the indictment and the checks introduced to support them were minor in nature, in fact, were not made in any essential parts of the checks described.

They were not such variations that would effect the substantial rights of Petitioner within the provisions of Rule 52 (a) Federal Rules of Criminal Procedure. Cf. *Berger v. United States*, 295 U.S. 78, 82; *Bennett v. United States*, 227 U.S. 333,338; *Arnold v. United States*, (9th. Cir. 1964) 336 F. 2d 1. Nor were they such that they could not be amended as matters of form under the provisions of Section 2941.30, Ohio Revised Code. Cf. *Dye v. Sacks, Warden*, 173 Ohio St. 422, 183 N.E. 2d 380.

Federal courts consistently have allowed amendments in indictments going only to the matter of form. Cf. *Dye v. Sacks, Warden*, (6th. Cir. 1960) 279 F. 2d 834; *Russell v. United States*, 369 U.S. 749, 770; *Del Piano v. United States*, (E.D.PA 1965) 240 F. Supp. 687; *United States v. Fawcett*, (3rd. Cir. 1940) 115 F. 2d 764, 767; *United States v. Denny*, (7th. Cir. 1947) 165 F. 2d 668, certiorari denied, 333 U.S. 844; *Williams v. United States*, (5th. Cir. 1950) 179 F. 2d 656, 659, *affirmed* 341 U.S. 97.

II.

Petitioner, by counsel, waived the right to cross-examine witnesses against him and notified the court and prosecution before trial that he would put on no evidence in his own defense. Counsel is in charge of the law suit and his decisions as to defense strategy and trial tactics are binding on his client. *Henry* v. *Mississippi*, 379 U.S. 443; *United States ex rel. Machado* v. *Wilkins* (2nd Cir. 1965) 351 F 2d 892. The state has a substantial interest in binding a defendant to his counsel's chosen strategy. *United States ex*

rel. Reid v. *Richmond*, (2nd Cir. 1961) 295 F. 2d 83. Defense strategy includes the question of whether or not to cross-examine witnesses or to demand to confront them. See, e.g., *Cruzado* v. *Puerto Rico*, (1st Cir. 1954) 210 F. 2d 789.

These decisions are binding on the defendant unless counsel's actions are arbitrary (manifesting "ineffective" counsel as defined by this court) or fatuous (manifesting incompetent counsel as defined by federal courts) or are specifically objected to by defendant (*Glasser v. United States*, 315 U.S. 60) or such general objection as to be tantamount to a request for a dismissal of counsel.

The record does not support the finding of any of these infirmities and the trial court therefore had a right to rely upon his judgment. Counsel's decision was deliberate, clear and under the circumstances of overwhelming evidence and no defense not an unwise choice even in hindsight. Nor is the statement that he was in no way pleading guilty inconsistent with his counsel's pretrial waiver of cross-examination and revelation that there would be no defense. It certainly could not be stretched to a specific rejection of this strategy. There is no intimation anywhere in the record that Petitioner was in any way dissatisfied with his counsel or wanted him dismissed.

III.

The introduction of the out of court sworn testimony of the alleged co-conspirator over defense counsel's objection was not constitutional error. Defense counsel had waived the right to cross-examine the witness even had he been called to confront the accused. Furthermore, the statement was made under oath. Since the fundamental fair trial guarantee in the right to confrontation is the right to cross-examine (*Pointer v. Texas*, 380 U.S. 400), the effective waiver of such right as a matter of trial tactics, removes

the constitutional infirmity of the admission of the statement.

Moreover, since it could arguably have been introduced in a civil suit as a statement against interest, exception to the hearsay rule, such introduction even without waiver or swearing would not have been fundamentally unfair. Cf. *United States v. Leathers*, (2nd Cir. 1943) 135 F. 2d 507, 511. The statement had something other than cross-examination and swearing to guarantee its truth. Cf. *Mattox v. United States*, 156 U.S. 237.

In keeping with the recognition by this court of the evolutionary development of due process (implicit in *Linkletter v. Walker*, 381 U.S. 618), if *Pointer v. Texas, supra*, is to be applied retrospectively to this case, only its strict "fundamental fairness" aspect (see concurring opinion of Harlan J., in *Pointer v. Texas*) should be applied. A strict "per se" sort of application of this sixth amendment right to the states would only undermine the confidence state courts place in the pronouncements of this court. Whatever the virtue of *Stein v. New York*, 346 U.S. 156, on close analyses, it certainly contained language that could have led a court at the time of the trial in this case, to believe that the sixth amendment right to confrontation did not inflexibly apply to the states.

IV.

Petitioner was denied no fair trial because of any prejudice on the part of the trial judge.

Although the question of judicial prejudice never was raised in the court below or in the petition for a writ of certiorari filed herein, Respondent submits that under the factual situation of this case the question of judicial prejudice just is not supportable.

Petitioner, one of three co-defendants, two of whom there-

tofore had pleaded guilty to the same indictments, was, on a plea of not guilty, provided with a court appointed counsel. After consultation with his counsel it was agreed as a part of the trial strategy that the case would be submitted at a trial before the court, wherein only a *prima facie* case would be required to be proved by the State. Prior to trial a colloquy in the nature of a pretrial hearing was held by the court and counsel in the presence of Petitioner. At this time the court was informed by Petitioner's counsel that the case was being submitted on a *prima facie* basis (E. 21). The court then defined his conception of a *prima facie* case as one wherein the defendant, not technically or legally, in effect admits his guilt and precludes cross-examination of State witnesses (R. 21). After this explanation Petitioner interjected, "I would like to point out in no way am I pleading guilty to this charge" (R. 22). The court then, in all fairness informed Petitioner that if he so desired he could have a jury trial even though he had waived one (R. 22). Fully realizing the court's conception of the meaning of a *prima facie* case and any implication the court attached to it, Petitioner then insisted that he desired to be tried by *this court* (R. 22). Even then the court offered to allow either a *prima facie* case or a full trial. Defense counsel indicated that a *prima facie* case was all *we are interested in* (R. 22). It is submitted that at that point Petitioner knew that he could have had the choice of a jury trial, a full trial by the court, or a *prima facie* trial by the court. He also knew that if he had a *prima facie* trial by the court, what the rules of such a trial would be. He further knew that if any prejudice had developed in the mind of the court, certainly it had developed at that time. He knew how the judge regarded a *prima facie* case, having taken part in the discussion with respect to it. In spite of this he insisted in being tried *by this Court.*

He hardly now can complain that the trial judge was pre
udiced. And an examination of the trial itself fails to ev
dence such a prejudice.

The trial court made no improper inference of guilt und
the law as it obtained at the time of the trial. Under t
decision of this Court in *Twining v. New Jersey*, 211 U.
78, the trial judge has been authorized to draw an adver
inference from a defendant's failure to testify. He also w
authorized to do so under Article I, Section 10 of the Co
stitution of Ohio. This conviction took place on March 2
1962 and *Griffin v. California*, 380 U.S. 609, holding th
adverse comment by a trial judge upon a defendant's fa
ure to testify, violated the federal privilege against sel
incrimination, was not decided until April 28, 1965. *Teh*
v. United States ex rel. Shott, No. 52 U.S., January 1
1966, held *Griffin v. California, supra*, not to be retr
active in effect.

The trial judge violated no constitutional right of Pe
tioner during the sentencing phase of the case. After co
viction and before sentence, an explanation by way
mitigation was made by defense counsel to the effect th
at the time the offenses were committed Petitioner w
under the influence of alcohol and benzedrine and had
recollection of the events surrounding him. The court ind
cated that in proceeding as he did on his not guilty pl
and being tried on a *prima facie* case, Petitioner was takin
a flier and had never expected to be acquitted. There
nothing in the record to show that the court was hostile
its attitude toward Petitioner nor that it condemned hi
for pleading not guilty. Further, there is nothing in t
record to support an inference that the court allowed t
not guilty plea to influence the sentence. The fact is th
the court imposed a much lighter sentence than was po
sible under the law.

ARGUMENT

THE SUPREME COURT OF OHIO CORRECTLY FOUND THAT THE PETITIONER HAD NOT CARRIED HIS BURDEN OF SHOWING THAT HIS CONVICTION AND SENTENCE TO THE OHIO PENITENTIARY WERE INVALID FOR VIOLATION OF DUE PROCESS OF LAW FOR WANT OF PROPER NOTICE AND A FAIR HEARING.

Before sentence in the original trial the following colloquy took place:

> "The Court: Defendant come forward.
> Now, Mr. Brookhart, you have just heard the finding and decision of the court in finding you guilty on these charges the court has mentioned. *Now, do you have anything to say why judgment should not be pronounced against you?* A. *Nothing your Honor.* (R. 54) (Emphasis added.)

Then Petitioner did not protest that he had not been sufficiently informed of the charges against him to prepare his defense or that had he known of the variances from the indictment he could have better defended himself.

Then Petitioner did not protest the fact that his counsel had not cross-examined the six accusers who confronted him.

Then Petitioner did not protest that a seventh accuser had not confronted him—a man who, incidentally to accusing himself of the same crimes, accused petitioner.

Then Petitioner did not suggest that had his counsel cross-examined his seven accusers new information would have been disclosed or their testimony impeached.

Then Petitioner did not suggest that there was exculpating evidence that he would like to have presented to the court.

Then the Petitioner did not complain that the court had not been impartial.

Then Petitioner made no complaint about his counsel o
counsel's conduct of his defense.
Then Petitioner did not proclaim that he was innocen
(nor has he ever so proclaimed) or complained that th
abbreviated procedure his counsel had agreed to was i
any way unfair.

Respondent does not now contend that from this on
particular incident at the close of the trial, one could sa
absolutely that the Petitioner had a fair trial, or from an
other particular incident. Respondent does contend, how
ever, that the fairness of this trial must be judged by view
ing the entire record and the facts and circumstances tha
surrounded it. See *Frank v. Magnum*, 237 U.S. 309 (dis
senting opinion by Holmes, J.)

There is little question that the most fundamental as
surance of a fair trial is that the defendant be represente
by counsel. *Powell v. Alabama*, 287 U.S. 45, 68-69. Counse
was appointed to represent defendant in this case. Petition
er's counsel do not contend that Petitioner's trial counse
was ineffective; and for good reason. There are apparentl
no facts to indicate either a conflict of interest [7] or lack o
time for preparation [8] or a want of zealousness [9] on the par
of Petitioner's court appointed counsel. Without evidenc
(or even allegations) to the contrary it must be assume
that counsel took reasonable pretrial steps to ascertain th
facts and explain the law to Petitioner.[10] It can be assume

7. Either in the sense of *Glasser v. United States*, 315 U.S. 60 o
Powell v. Alabama, 287 U.S. 45.

8. Counsel was appointed February 1, 1962 (R. 12 & 13) and tri
began March 23, 1962. (R. 20) *Powell v. Alabama, supra*, and *Haw
v. Olsen*, 326 U.S. 271.

9. Petition for Writ of Certiorari p. 7. See *Post v. Cunningham*, 34
F 2d 1 (4th cir. 1965).

10. See *Michel v. Louisiana*, 350 U.S. 91, 101 (Stating that there is
presumption of the effectiveness of counsel, which respondent contend
certainly would include necessary pretrial preparation.) See also *Bru
baker v. Dickinson*, 310 F. 2d 30 (9th cir. 1962).

that counsel knew that Petitioner's alleged co-conspirators named in his indictment had pleaded guilty (R. 31) or confessed (R. 59) and would be available to testify against him. He knew that Petitioner would not take the stand in his own defense, because Petitioner had apparently told his attorney that he couldn't remember a thing that had happened. (R. 55) He knew that there were no witnesses in his client's defense.[11]

With the above in mind, the Supreme Court of Ohio found that the Petitioner had not been shown fundamental unfairness. The expeditious procedure adopted by opposing counsel here and concurred in by the court would, no doubt, in certain circumstances be fundamentally unfair. If court appointed counsel had had no time to prepare his defense, had had conflicting interests, or had appeared listless in his efforts to defend; or had the evidence produced at trial not appeared so overwhelming and unimpeachable, then the procedure adopted here could raise serious constitutional questions.[12] But that is not the situation in this case and it goes without saying that in due process determinations of the fairness of a hearing, each case must be decided on its own facts and circumstances, (See *Crooker v. California*, 357 U.S. 433, 441, note 6[13]; *Lisemba v. Cali-*

11. Besides the fact that petitioner alleged he could remember nothing, it is clear that the only persons who were with him during the period of the offense were the two accused co-conspirators. There is nothing in the record to indicate that trial counsel was not familiar with the sworn (though uncross-examined) confession by Mitchell. In fact, the nature of the tactic adopted by counsel (admittedly "zealous" in his client's defense at trial) suggests that he was well aware of the overwhelming evidence against his client.

12. See *Glasser v. United States*, *supra*, at 67.

13. Note 6 states *inter alia*: "What due process requires in one situation may not be required in another, and this, of course, because the least change of circumstances may provide or eliminate fundamental fairness."

fornia, 314 U.S. 219, 236) and that consistent with our federal system of government, states may adopt procedures fitted to local needs. See *Snyder v. Massachusetts*, 291 U.S. 97, 105.

Respondent proceeds then to answer in particularity petitioner's arguments.

I.

THE SUPREME COURT OF OHIO CORRECTLY FOUND THAT THE ALLOWANCE OF THE AMENDMENTS AS TO MATTERS OF FORM DURING THE TRIAL DID NOT CONSTITUTE A TRIAL UPON CHARGES OTHER THAN THOSE RETURNED AGAINST PETITIONER NOR A DENIAL OF REASONABLE NOTICE OF THE CHARGES ULTIMATELY TRIED; THAT THE AMENDMENTS IN NO WAY CHANGED THE NATURE, NAME, OR IDENTITY OF THE CRIME CHARGED.

In Ohio the Legislature has provided that an indictment is not made invalid, in the trial, judgment, or other proceedings stayed, arrested, or affected:

> "(D) For stating imperfectly the means by which the offense was committed except insofar as means is an element of the offense;
>
> "(E) For want of a statement of the value or price of a matter or thing, or the amount of damages or injury, where the value or price or the amount of damages or injury is not of the essence of the offense, and in such case it is sufficient to aver that the value or price of the property is less than, equals, or exceeds the certain value or price which determines the offense or grade thereof;
>
> "(I) For surplusage or repugnant allegations when there is sufficient matter alleged to indicate the crime and person charged;
>
> "(J) For want of averment of matter not necessary to be proved;
>
> "(K) For other defects or imperfections which do not tend to prejudice the substantial rights of the defendant upon the merits." [14]

The Ohio Legislature also has provided that no indictment shall be quashed, set aside, or dismissed upon the

14. Ohio Revised Code, Section 2941.08 (1953).

basis that an uncertainty exists therein; if the court is of the opinion that any uncertainty exists therein it may order the indictment amended to cure such defect, provided no change is made in the name or identity of the crime.[15]

The Ohio Legislature further has provided that the court may, at any time, before, during, or after trial, amend the indictment in respect to any defect, imperfection, or omission in form, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to cure a variance between the indictment and the proof, the accused is entitled to a reasonable continuance of the cause unless it clearly appears from the whole proceedings that he has not been misled or prejudiced by the variance in respect to which the amendment is made.[16]

In Ohio the crimes for forgery and uttering and publishing as pertains to this case are defined as follows:

> "No person, with intent to defraud, shall falsely * * * forge * * * or with like intent, utter or publish as true and genuine such * * * forged * * * matter, knowing it to be * * * forged * * *."[17]

An examination of all counts of the indictment for forgery and uttering and publishing in this cause show conclusively that they meet all the requirements of the statute (R. 5-9). Each count in itself contains all the essential elements to name and identify the crime. It then remains to be determined whether the indictment fairly apprised Petitioner of the offenses that he would be called upon to answer.

Counts one and two were predicated upon a check number 364, drawn upon the State Bank Company, Massillon, Ohio, and called for the payment to the order of Jimmy

15. Ohio Revised Code, Section 2941.28 (1953).
16. Ohio Revised Code, Section 2941.30 (1953).
17. Ohio Revised Code, Section 2913.01 (1953).

Cox, the sum of $57.82. It was signed in the name of R. J. Buchannon as treasurer of Beacon Boxes, Inc. There is no question, therefore, that Petitioner was apprised of the offenses for which he was charged, both as to name and identity. All other checks included, in a similar manner, all of the necessary elements of the offenses charged.

The court allowed the amendment of counts one and two by changing the number of the check from 364 to 361 and the amount from $57.82 to $57.58 (R. 24). The number on the check has no purpose whatsoever except to provide a bookkeeper with an orderly process of keeping accounts. It does not effect the validity of the check in any way. Whatever the amount for which the check was drawn, provided a sum was indicated, it constituted an order for the bank to pay money, and therefore, represented value. Certainly the variance between the indictment and the proof on these counts is so insignificant that it is difficult to conceive how it could prejudice the substantial rights of the Petitioner upon the merits in any way.

An even less significant change was made with respect to counts three and four wherein only the number of the check was changed from 364 to 367 (R. 26).

A somewhat different situation developed with the fifth and sixth counts of the indictment. The court initially allowed an amendment to change the number of the check from 364 to 374 and the amount from $57.82 to $72.63 (R. 26). Defense counsel presented as a further basis for objection the fact that on the indictment served upon the Petitioner the name of the payee on count five and six was blank (R. 33). It also appeared that the name of the payee on the original indictment was Jimmy Cox, but that on the check upon which it was based (Exhibit "C") the name of the payee was James Brookhart (R. 33). When a motion to amend to change the name from Jimmy Cox

to James Brookhart was made the court reserved its ruling in order to check the law on a subject (R. 38). After consultation with counsel in chambers (R. 51), the court allowed the amendment. It did so relying upon the statute allowing an amendment (Section 2941.28, Ohio Revised Code) (R. 52). It is submitted that a change in the name of the payee or the addition of the name of the payee of a check has no bearing on whether or not it is a forgery. The signature of the maker and/or the endorser are the material elements of the crime because it is by virtue of these signatures that payment is made.

Petitioner cannot complain of lack of notice for another reason. If Petitioner's counsel had found the indictment and proof at variance in such manner that he considered the indictment fatal, he should have, in accordance with the provisions of Ohio law,[18] filed a motion to quash the indictment; and if it appeared to him for the first time during the trial he was bound, under this section, to have moved to quash the indictment when it first came to his attention. A careful examination of the record fails to show any motion to quash.

Further if he had found that he was jeopardized in any way in defending the amended indictment he should have moved for a continuance.[19] An examination of the record fails to disclose such a motion.

When Petitioner presented to the Ohio Supreme Court his contention that he was not tried upon the indictment returned by the grand jury but rather one returned by the prosecutor, that court had before it the record of the trial court. The court found with respect to this contention as follows:

"Section 2941.30, Revised Code, provides in part as follows:

18. Ohio Revised Code, Section 2941.29 (1953).
19. Ohio Revised Code, Section 2941.30 (1953).

"'The court may at any time before, during, or after a trial amend the indictment, information, or bill of particulars, in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged.'

"This section permits amendments to an indictment, which do not change the nature or identity of the offense.

"The indictments presently before us were for forgery and uttering a forged instrument. They were complete on their face and properly charged the offense in issue. An amendment to an indictment for forgery or uttering, which merely changes the check numbers, amounts or the names of the payee as set forth in the indictment, is a matter of form, not of substance, and in no way affects the nature or identity of the offense as charged. Thus, such amendments relating to form and not substance are proper. *Dye v. Sacks, Warden,* 173 Ohio St. 422." (R. 78)

This construction of the law by the Ohio Supreme Court is no different with respect to the amendment of an indictment as to matters of form than that enunciated by this Court as follows: "* * * this underlying principle [that an indictment must be returned by a grand jury] is reflected by the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury unless the change is merely a matter of form". *Russell v. United States,* 369 U.S. 749, 770.

In sustaining an Ohio conviction wherein the indictment charging armed robbery was amended by correcting a misdescription of the victim's name, a federal court held that the amendment related to a matter of form and not of substance and did not change the nature of the offense charged, and such amendment did not invade accused's constitutional rights. *Dye v. Sacks, Warden,* (6th Cir. 1960) 279 F. 2d 834. Certainly the name of a payee, or an amount

on a check alleged to have been forged, is no less a matter of form than is the name of a victim alleged to have been robbed and certainly it is no less a matter of form than substituting the words "Federal Savings and Loan Insurance Corporation" for the words "Federal Deposit Insurance Corporation", the victim in a bank robbery indictment. Del Piano v. United States, (E.D.PA 1965) 240 F. Supp. 687.

One federal test with regard to the amendment of an indictment appears to be:

> "* * * the [federal court] test as to whether a defendant is prejudiced by an amendment to an indictment has been said to be whether a defense under an indictment as it orginally stood would be equally available after the amendment is made, and whether any evidence the defendant might have would be applicable in the one form as in the other." *United States v. Fawcett,* (3rd. Cir. 1940) 115 F. 2d 764, 767. See also *United States v. Denny,* (7th Cir. 1947) 165 F. 2d 668, *certiorari denied,* 333 U.S. 844.

Another test has been that,

> "If a defendant is in no sense misled, put to added burdens, or otherwise prejudiced, by an indictment such an amendment [changing the name of the corporation that defendant was alleged to have been working for] ought to be considered and treated as an amendment of form and not of substance, and therefore, allowable, even though unauthorized by the grand jury." *Williams v. United States,* (5th Cir. 1950) 179 F. 2d 656, 659, affirmed 341 U.S. 97.

It further is submitted that the allowance of the amendment by the trial court not only did not prejudice Petitioner in any way, but also need not have been made in order to convict Petitioner of the offenses charged. The variances between the allegations and the proof were not such as would affect the substantial rights of Petitioner.

Federal rules of criminal procedure provide that any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.[20]

Federal courts consistently have interpreted this rule to mean that, where the indictment and proof correspond substantially or where the defendant could not have been misled at the trial or deprived of protection against another prosecution for the same offense, the variance is not material.

This Court has so held in a case wherein the indictment charged Petitioner to have conspired with seven other persons and the proof developed that two different conspiracies, one with two persons and one with three persons actually had taken place. Petitioner was involved in only one. This Court held:

> "The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be able to present his defense and not be taken by surprise by the evidence offered at the trial; and (2) that he may be protected against another prosecution for the same offense." *Berger v. United States*, 295 US. 78, 82. See also *Bennett v. United States*, 227 U.S. 333, 338; *Arnold v. United States*, (9th. Cir. 1964) 336 F. 2d 347; *United States v. Haskins*, (6th. Cir. 1965) 346 F. 2d 1; *Brilliant v. United States*, (8th Cir. 1962) 297 F. 2d 385, *certiorari denied*, 369 U.S. 871.

Respondent has no quarrel with the contention that a trial court cannot permit the State to try an accused for offenses other than those with which he was charged in the indictment, but it seriously contends that such permission was not afforded the State in Petitioner's trial.

Respondent also has no quarrel with the decisions cited by Petitioner. In *Cole v. Arkansas*, 333 U.S. 196, the indict-

20. Rule 52 (a), Federal Rules of Criminal Procedure, 28 U.S.C.

ment charged an offense under and in the language of section two of a statute which defendant claimed to be unconstitutional. The Arkansas Supreme Court affirmed the conviction on the basis that the proof was sufficient to allow the court to find defendant guilty under section one of the statute. It failed to consider either the sufficiency of the evidence to sustain the conviction under the alleged section of the statute or the constitutional objections raised by defendants thereto. This Court held that such procedure had the effect of convicting the defendant without a trial.

And *In re Oliver,* 333 U.S. 257, no indictment was returned at all but rather Petitioner was summarily committed for contempt. This Court held that such commitment constiuted a denial of due process in violation of the Fourteenth Amendment because a reasonable opportunity to be heard on the contempt charge had not been afforded Petitioner.

In *Russell v. United States,* 369 U.S. 749, at 755, the indictment was held to be faulty because it did not allege an essential element of the offense, namely that it did not identify the subject matter under inquiry by a congressional committee; that such identification would be essential to the determination as to whether the question which the witness refused to answer was pertinent to the subject then under investigation by the congressional body which summoned defendant.

In *United States v. Cruickshank,* 92 U.S. 542, at 558, an indictment which charged that defendant had conspired to prevent certain citizens in the free exercise and enjoyment of "every, each, all and singular" the rights granted by the Constitution to be invalid for vagueness. This Court held therein at page 558, "a crime is made up of acts and intent; and those must be set forth in the indictment with

reasonable particularity of time, place, and circumstances". (Emphasis supplied.)

And in *De Jonge v. Oregon,* 299 U.S. 353, at 362, this Court held that an indictment for a violation of a criminal syndicalism statute charged no crime at all. And there being no charge there could be no conviction.

In *Stirone v. United States,* 361 U.S. 212, an indictment charging the violation of a federal statute by interfering with interstate movement of commerce which alleged an interference with the movement of sand would not support a conviction for the interference of the movement of steel, an entirely different commodity.

Since the rule of *Ex Parte Bain,* 121 U.S. 1, this Court has repeatedly held, as have all other federal courts, that amendments constituting only a change in form and in going to the substance of the offense charged are permissible without invalidating the indictment returned by the grand jury.

Were the descriptions of the checks radically different from that contained in the indictment as contended in Petitioner's brief,[21] it is possible that the Ohio Supreme Court might have found otherwise than it did, but certainly the amendments made were not radical, in fact, were minor in detail and did not change the identity of the offense nor any of the necessary elements thereof.

Nothing in *United States v. Hess,* 124 U.S. 483, or *United States v. Simmons,* 96 U.S. 360, compels a different conclusion. In *Hess, supra,* the indictment charging fraud failed, for failing to allege the scheme constituting the fraud, and this Court found that such was an essential element of the crime. In *Simmons, supra,* under a statute prohibiting the use of a still where the defendant, himself, was

21. Page 42 of Petitioner's brief.

not charged with using the still but only with causing or procuring someone else to use it, the name of that person was considered to be an essential element of the offense and should have been alleged.

Respondent, in the light of all decisions, cited both by the Petitioner and Respondent again submits that any amendments made in the indictment were as to matters of form only and in no way charged the nature or identity of the offenses charged and, in fact, that the indictments would have supported the convictions thereon under the proof submitted without amendment. Such amendments, in no way, violated any constitutional rights of Petitioner nor rendered the trial unfair.

II.

THE SUPREME COURT OF OHIO CORRECTLY FOUND THAT PETITIONER'S TRIAL WAS NOT UNFAIR FOR HE WAS AFFORDED ALL HIS CONSTITUTIONAL RIGHTS AND WHILE REPRESENTED BY COUNSEL WAIVED SOME OF THESE RIGHTS AND RETAINED OTHERS AND THOSE RIGHTS NOT WAIVED WERE FULLY PROTECTED.

A. Petitioner Waived His Right To Cross-Examine Witnesses Against Him For The Acts Of Counsel For Defendant Made In Defendant's Presence Including The Waiver Of The Right To Cross-Examine Are Presumed To Be The Acts Of The Defendant, Himself, And This Presumption Can Be Rebutted Only By A Showing Either That The Acts Were So Arbitrary And Fatuous As To Manifest A Marked Want Of Concern For His Client's Interest Or That Defendant Made Specific Objection To His Counsel's Act Or Made Such General Objection To The Acts Of His Counsel As To Be Tantamount To A Request For His Dismissal.

1. Defendant's Trial Counsel Effectively Waived Defendant's Right To Cross-Examine For A Defendant Can Waive Any Or All Rights In A Criminal Prosecution And Most Rights, Especially Those Relating To Defense Strategy Or Trial Tactics, Can Be Waived By Defense Counsel.

Petitioner does not deny that the right to cross-examine the witnesses against him can be waived. He alleges, however, that this right must be waived personally by the defendant, himself. Although it is certainly true that certain rights are of this nature, those relating to defense strategy and trial tactics are not.

Henry v. Mississippi, (1965) 379 U.S. 443; *United States ex rel. Machado v. Wilkins,* (2d Cir. 1965) 351 F. 2d 892; *United States ex rel. Reid v. Richmond,* (2d Cir. 1961) 295 F. 2d 83 (sitting with a five judge court), *rehearing denied* October 11, 1961; *certiorari denied,* 368 U.S. 948; *rehearing denied,* 368 U.S. 979; *rehearing denied,* 369 U.S. 881; *Cruzado v. People of Puerto Rico,* (1st Cir. 1954) 210 F. 2d 789, 791,[22] Certainly the decision as to whether to cross-examine any particular witness or none of the witnesses is particularly within the province of defense counsel. See opinion of Magruder, Chief Judge, in *Cruzado v. People of Puerto Rico, supra,* at 791.

The recent case of *United States ex rel. Machado v. Wilkins, supra,* provides a close analogy to the case at bar. There court appointed counsel stipulated that the People's case be submitted on the preliminary transcript (at which defendant appeared without counsel and no witnesses were cross-examined) and "thus consented to its introduction as a matter of trial strategy". (at page 894) The court concluded at 895:

> "In essence the appellant's position is that as a matter of hindsight he disagrees with his counsel's trial strategy and therefore claims that he was not competently represented. Appellant is bound by the strategy which his counsel adopted [citing *Henry v. Mississippi, supra*] unless he was so inadequately represented as to make his trial a mockery of justice. * * *"

True, in the cases cited above, the pretrial waiver of cross-examination was done upon viewing testimony al-

22. See also, *Wilson v. Gray,* (9th Cir. 1965) 345 F. 2d 282 (right of confrontation); *Rhay v. Browder,* (9th Cir. 1965) 342 F. 2d 345 (propriety of instructions); *United States v. Joseph,* (6th Cir. 1964) 333 F. 2d 1012, 1013 (right of confrontation).

ready given and reduced to record. But is that substantially different from the pretrial waiver by a defense counsel appointed substantially ahead of trial who certainly could have known of the quantity and quality of physical and eyewitness evidence against his client, (see note 5, *supra*) and certainly must have known of this given his admitted zealousness at trial (and no allegation of want of such zeal before trial) and the defense strategy adopted. He, in effect, told the court beforehand that my pretrial investigation reveals that we have no defense, no knowledge of impeaching evidence but we will call upon the State to prove their allegations by competent and relevant evidence.[23] We will tell the State beforehand, that it will not need to reconstruct the credibility of witnesses for I know of nothing on which I can construct a cross-examination to destroy their testimony. The State need not, therefore, pile on the evidence. That this was the general nature of counsel's suggestion is borne out by his attempt to preserve the right to cross-examine if anything new came up (R. 21). After the court explained its understanding of a "*prima facie* case", the protest by defendant of the "in effect admits his guilt" aspect of the "ordinary *prima facie* case", and a further brief colloquy, counsel was apparently satisfied that the best strategy was to proceed as originally planned knowing that the court had been informed by the defendant that the "ordinary" "in effect plea of guilty" was repudiated. He was apparently further relying on the original statement of the court that it would not find him guilty "if (sic) [unless] [24] the evidence is substantial".[24a] Counsel, therefore, chose to proceed without cross-

23. In *Powell v. Alabama, supra,* Mr. Justice Sutherland pointed out that one of the chief functions of trial counsel is to make sure that an accused is convicted only on relevant and competent evidence.

24. Respondent does not know whether the word "if" is an error in transcription by the stenographer or was actually said. In either event, it is clear that the court meant "unless the evidence is substantial".

examination. Whatever the wisdom of such a strategy (which as we point out below was considerable under the circumstances) the State has a crucial and legitimate interest in being able to rely on defense counsel's adopted strategy. *United States ex rel. Reid v. Richmond, supra,* at 89, 90. To hold otherwise would be to make questionable every trial where defense counsel has failed to gain an acquittal.

Respondent does not contend that in every case a court may rely on the adopted strategy of defense counsel. But, given the facts of this case, it was proper.

2. Given The Facts And Circumstances Of This Case Trial Counsel Did Not Manifest A Marked Disregard For His Clients Interest In Choosing A Defense Strategy Which Included Waiving The Right To Cross-Examine Witnesses Nor Did Defendant Specifically Object To This Waiver Nor Make Such General Objection To Counsel's Conduct Of His Defense As To Be Tantamount To A Request For Dismissal.

In deliberately adopting the trial strategy of the waiver of the right to cross-exmaine witnesses and of what amounted to pretrial notification that the defense had no witnesses to testify in its own behalf, trial counsel acted in a manner quite consistent with his client's interests, given the circumstances of his case. There has been no

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Since defense counsel had already told the court (R. 21) that defense had no evidence, it is unreasonable to assume that the court meant to say, "I won't find him guilty if the evidence, which you're not going to put on, is substantial". The further statement by the court at the end of the colloquy conirms this (R. 22) as well as his conduct of the trial and his findings of fact (R. 54). Counsel who heard the statement must have understood him to mean "unless" not "if". The Supreme Court of Ohio implicitly so found (R. 81).

24a. Note, also, that when counsel moved for dismissal at the close of the state's case (R. 53), it was on the grounds that the state had failed "to sustain the *burden of proof as required in criminal cases.*" (Emphasis added.) This is further proof of his understanding of what the court intended to do.

suggestion that there were witnesses who could have testified in defendant's behalf. Defendant, himself, could not testify [or so he told his attorney (R. 55)] because he couldn't remember anything. There is no allegation that counsel could have known any facts by which to impeach the witnesses or otherwise cast doubt on their credibility. All defense counsel gave up in reality then, was the opportunity to cross-examine if anything new came up (R. 21). Perhaps by this procedure counsel hoped to lull the prosecution into making a mistake in proving all the elements of the offense. Or perhaps he hoped, as happened, that some part of the physical evidence would fail (R. 53) and that the court would not allow a continuance because of the expeditious nature of the proceedings. Counsel certainly indicated this as part of his strategy when he said: "We claim we are entitled to proceed immediately or terminate the trial at this point" (R. 50). Perhaps he hoped that the court would not allow the indictments to be amended (e.g. R. 23, 32). Whatever his particular expectation was it seems clear that his strategy was that with the overwhelming evidence against his client, his only hope was for a victory on technicalities. By proceeding in an expeditious manner this stratagem had the greatest chance for success.

Another probable consideration in the choice of this defense strategy was the hope of a mitigated penalty. Counsel probably felt that by this procedure he could make his defendant appear to be at least an approximation of the proverbial contrite and candid defendant throwing himself on the mercy of the court. True, here, the court appeared not impressed with this partial show. But better this than requiring the court to sit through the full proof expecting some show, some defense, some predication for the plea of not guilty and getting but a dumb show. The

court here could have on its verdict imposed a sentence of eight to one hundred and forty-two years (R. 15-17). It, in fact, imposed a sentence of three to sixty years (R. 15) with parole eligibility in twenty-seven months.[25]

Another possible consideration was the avoidance of civil liability, which a plea of guilty would have made certain. At the same time Petitioner's plea of not guilty did not forfeit one of the usual advantages of a plea of guilty, an advanced trial date, and thus the opportunity to begin serving the sentence early.[26]

Whatever the exact theory counsel had in mind, it is apparent counsel's choice was deliberate. He first mentioned it (R. 21) and finally approved of it (R. 22). After this final approval, Petitioner, himself, said absolutely nothing until the verdict was rendered (R. 54). This approval was neither capricious nor unwise. Even in hind-

25. Ohio Revised Code, Section 2965.31 (c); now Ohio Revised Code, Section 2967.19 (c).

26. While Petitioner had been in the county jail approximately two months (R. 22 and page 18, Petition for a Writ of Certiorari) this was well within his Ohio constitutional and statutory right to a speedy trial (Article I, Section 19, Constitution of Ohio; Sections 2945.72 and 2301.05, Revised Code; *Johnson v. State*, 42 Ohio St. 207) and any such federal constitutional right. See *Hoag v. New Jersey*, 356 U.S. 464, 472. Petitioner's present counsel suggests (Brief, page 26, note 3) that the court put improper pressure on Petitioner by telling him (R. 22) he could still have a jury trial if he wanted a full trial. When Petitioner rejected this by saying "* * * I would like to be tried by this court * * *", (R. 22) the court *in effect* asked: "tried in what manner by this court, prima facie case or complete trial?" (R. 22) This was a proper option. Moreover, although one has a right not to have a jury in Ohio, Section 2945.05, Revised Code, such section does not give an accused the *right* to have his trial advanced. There is no statutory or other guarantee in Ohio that a court sitting without a jury will hear the case sooner than one with a jury. Any advantage that a full trial before the court sans jury has over a full trial with jury, as far as advancement, is in the supposition that juries are not as available as judges. It would have little or nothing to do with the nature of the proof and the kind of preparation the prosecution must make. But it is precisely this latter factor that seemed to dictate the advancement in this case (R. 22). Since defense counsel had apparently notified the prosecution (R. 50) that it would not and could not (see above) put on a defense, the prosecution need not make as elaborate a preparation and thus could go to trial sooner.

sight it cannot be said to have been unwise. Petitioner has yet to assert a single thing cross-examination would have accomplished, had counsel chosen to proceed in that fashion. Petitioner's learned counsel before this Court suggests feebly that since eighteen months had elapsed between the date of the incidents alleged in the indictment and the date of the trial, maybe fading memories could have been trapped in a web of cross-examination.[27] The record suggests no failure in memory. Or, perhaps, evidence could have been offered. What evidence? What witnesses? From the fiber of whole cloth is spun this potential defense.

Let us make it clear, Respondent does *not* make these arguments to show that if there was error it was not prejudicial. For if there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it. But Respondent does assert that when trial counsel deliberately, after ample time for preparation and consultation, chooses a method of defense (even hindsight revealing no wiser choice) then the State has a right to rely on that choice. Even if hindsight should have shown the choice to have been unwise, as long as it was the product of "good-faith representation, with all the skill counsel possesse[d]"[28] and not so transparently unwise as to make a farce of the defense, or belie the name of counselor and advocate, it would not entitle Petitioner to a second chance. *United States ex rel. Machado v. Wilkins, supra*; *United States ex rel. Reid v. Richmond, supra,* at 89. See also *Post v. Cunningham,* (4th Cir. 1965) 344 F. 2d 1; *Hester v. United States,* (10th Cir. 1962) 303 F. 2d 47 and compare *Penado v. Bailey,* (5th Cir. 1965) 340 F. 2d 162

27. Page 21 of Petitioner's Brief.
28. Hickock v. Crouse, (10th Cir. 1964) 334 F. 2d 95, 100.

and *Brubaker v. Dickson,* (9th Cir. 1962) 310 F. 2d 30, with the above.

Of course, this is really the standard for competency of counsel and counsel for Petitioner do not contend trial counsel was incompetent. Rather they contend that the right to confrontation and even the right to cross-examination were not waived because they are personal rights and can only be waived by the defendant himself, either expressly or implicitly. Respondent has shown that the overwhelming weight of authority reveals this to be a false premise.

Flowing then from the very nature of the attorney-client relationship and the purpose for the appointment of counsel (see *Powell v. Alabama, supra*), the State has a right to rely on the chosen tactics of counsel, unless such tactics are so patently fatuous as to manifest either "ineffective"[29] or incompetent counsel.

Of course, the State could not so rely if either the well consider waiver of the right to cross-examine witnesses (and advance notification that the defense would not contest the State's case with its own evidence) had been specifically repudiated by Petitioner or had Petitioner, at some point during his trial, made such general objection to the conduct of his defense by counsel as to let the court know he no longer wished such counsel to represent him.

Petitioner contends that objection is not irrelevant. Respondent agrees. Petitioner contends that there was an objection in this case. Respondent disagrees. To be an objection it must be specific. To be specific it must be such that the court is reasonably informed of what is objected to, and it must not be withdrawn. Cf. *Glasser v. United States,* 315 U.S. 60, 70. Certainly the cases cited by Peti-

29. As defined above, see notes 1, 2 and 3.

tioner[30] and Respondent, above, do not dictate a different conclusion. As Petitioner says, in those cases "* * * the court carefully pointed out that there was no objection".[31] But as to the nature of the objection that must be interposed, these courts are silent. It would seem to be implicit that any objection, in order to be an effective objection, must be such that a court could understand specifically what was objected to so that it could know how to further proceed.

In the present case even viewing the statement interjected by Petitioner in the opening colloquy (R. 21-22) most favorably to Petitioner (which the Supreme Court of Ohio would not be bound to do on collateral attack), all that can be said is that Petitioner objected specifically to the "in effect plea of guilty" aspect of the *prima facie* case and in some vague general way perhaps to the entire idea of a *prima facie* case. When the court made further inquiry, Petitioner said he wanted to be "tried by the court". When the court inquired in what manner tried by the court, counsel indicated that they wished to proceed as originally agreed, and thereafter, at no time and in no way did Petitioner voice a dissent from this agreement. At best then, any objection made by Petitioner (other than that he was not in effect admitting his guilt) was, on further inquiry by the court, withdrawn.

However, viewing this colloquy most favorably to the State (as the Supreme Court of Ohio had a right to do on collateral attack) this supposed objection by Petitioner was merely a reiteration that he was pleading not guilty and that he was not, in effect, admitting his guilt. It had no relationship to the waiver of right to cross-examine witnesses against him or the advance notification that the defense would offer no evidence in its own behalf. At no

30. Page 26 of Petitioner's brief.
31. Page 26, *Ibid.*

time does Petitioner, himself, mention the right to cross-examination or that he wants to testify or to put on his own witnesses.

It can, of course, be assumed that only if a defendant knows the law will he know whether or not to waive the right to cross-examination before the trial begins and it is certain that if he does know the theory behind cross-examination, that he could make specific objection to the loss of that right. (i.e. in some way mention questioning or examining witnesses). However, it is for the very reason that he is presumed not to know how to conduct his defense, that counsel is appointed. It is for this same reason that the decision as to whether to cross-examine witnesses or as to what evidence to offer is left to counsel. By the very nature of the attorney-client relationship, in these matters clearly within the competence of counsel and out of the competence of a layman, the acts of counsel are presumed to be the acts of the client, including the act of withdrawal of even some vague objection.

Glasser v. United States, supra, certainly does not indicate otherwise. In *Glasser* the right that was waived by counsel was the right to "effective" counsel. It was a right which involved the very nature of the attorney-client relationship. To hold otherwise, than that the client must expressly accept an altered relationship with his attorney and expressly withdraw any objection to such alteration, would be tantamount to allowing an attorney to unilaterally create the attorney-client relationship and all its incidents. In the case at bar, the waiver was a matter of defense strategy, not involving this relationship, and strictly within the usual purpose and terms of this relationship.

In short, Petitioner, either knew what was going on at his trial or he did not. If he did, then surely his one non-specific objection and continuing silence thereafter were

not adequate to inform the court of the strategy he wished to adopt. If he did not know, then he was bound by the strategy adopted by his counsel, with the limitations as set forth above. He could not have it both ways: i.e., his ignorance calling for extremely liberal construction of his vague objection and his awareness allowing him, not his counsel, to dictate trial strategy. The dissenters below would let him have it both ways (R. 87). The majority of the Supreme Court of Ohio, consistent with protecting the state's vital interest in having reasonably definitive conclusions to criminal trials, could not.

B. The Admission Of The Statement Of The Co-conspirator Into Evidence Was Not Constitutional Error Because Defense Counsel Had Completely Waived The Right To Cross-Examine The Maker Of The Statement, The Primary Reason For The "Confrontation Rule" And Moreover It Was Made Under Oath. In Addition, The Statement Had A Truth-guaranteeing Substitute For The Right To Cross-Examine In That It Was A Statement Against Interest. The Right To Have The Fact Finder See The Witness Testify, The Probable Basis Of Defense Counsel's Objection, Is Not, Without More, A Constitutional Right.

In *Douglas v. Alabama,* 380 U.S. 415, this Court stated at page 417, that "* * * an adequate opportunity for cross-examination may satisfy the clause [right to confrontation] even in the absence of physical confrontation." In the present case, the right to cross-examination was waived.

Moreover, in *Pointer v. Texas, supra,* this Court indicated that certain exceptions to the hearsay rule are also exceptions to the right to confrontation, citing *Mattox v. United States,* 156 U.S. 237. In *Mattox,* the admission of a dying declaration was deemed proper despite the objection to its admission as a violation of the right to confrontation,

because it had a truth-guaranteeing substitute for cross-examination. The out of court statement (State's Exhibit "E", R. 58-70) was a confession which put the declarant in the penitentiary. It is difficult to believe any man would make such statements from any motive other than to tell the truth. See *Donnelly v. United States*, 228 U.S. 243, 278. (Dissenting opinion by Holmes, J.) True, confessions cannot ordinarily be used against another in a criminal prosecution. See *Douglas v. Alabama, supra.* Nonetheless the fact that there was such truth-guaranteeing substitute for cross-examination, is an additional indicium of the fairness of the admission of the confession in Petitioner's trial. The fact that the statement was made under oath (R. 60), is another indication of its truthworthiness and thus of the fairness of its admission.

The probable basis of defense counsel's objection was that Petitioner had a right to have the trial court (fact finder) see the witness testify (R. 39). As both *Pointer* and *Douglas* indicate, this is not the fundamental fair trial protection underlying the Sixth Amendment or Fourteenth Amendment right to confrontation. The primary basis is the opportunity to cross-examine the witness. In *Mattox*, the court does mention that having the fact finder see the witness testify is an element of the right of confrontation but then relegates this element to secondary importance by holding that, where there is necessity and a truth guaranteeing substitute for cross-examination, the right to confrontation is satisfied.

But even less can this "right to have witnesses viewed" be said to be a part of the strictly Fourteenth Amendment right to confrontation. See concurring opinion of Mr. Justice Steward in *Pointer v. Texas, supra,* at 410. In keeping with the implicit recognition by this Court of the evolutionary development of the concept of due process, (*Link-*

letter v. Walker, 381 U.S. 618) this court should apply the right to confrontation to this case only in its Fourteenth Amendment, "fundamental fairness," aspect. Whatever the merit of *Stein v. New York,* 346 U.S. 156, *overruled on other grounds, Jackson v. Denno,* 378 U.S. 368, it did say that there was no Fourteenth Amendment right to confrontation. Petitioner's conviction became final before this was overruled. At the time of trial then Petitioner had, by the best light then available to the court, only a Fourteenth Amendment right to cross-examine witnesses. This right was waived. To promote confidence in the reliability of the decisions of this Court, Respondent submits that only this aspect of *Pointer* should be applied to this case. But, even should the Sixth Amendment right to confrontation be applied to this case, it would call for no different result.

C. The Supreme Court Of Ohio Properly Considered In Its Findings That Petitioner Had Not Been Denied A Fair Trial Because Of Prejudice On The Part Of The Trial Judge In That It Found That No Presumption Of Guilt Was Created By The Agreement To Try The Case On A Prima Facie Basis; That No Presumption Arose Or Was In The Mind Of The Trial Judge; That The Trial Judge Found Petitioner Guilty Only On Those Counts Proved By The Evidence; And The Trial Court Made Available To Petitioner All Of The Rights To Which He Was Entitled And That Petitioner Had Seen Fit Not To Avail Himself Of Certain Of Them.

1. Petitioner Has Never Raised The Question Of Judicial Prejudice Until It Appears In the Brief Filed Herein.

A thorough examination of the proceedings in the Ohio Supreme Court and in his petition for certiorari filed herein fails to disclose a contention by Petitioner of prejudice on the part of the trial judge. The Ohio Supreme Court,

however, did consider this question in deciding the case below.

Respondent considers that the applicable rules of this Court, with respect to considerations governing review on certiorari in the case herein, are Rules 19, 1 (a); 23 (c) and 40, 1 (d) (2).

Rule 19, 1 (a)[32] provides in part as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The questions presented to and decided by the Ohio Supreme Court were: (1) that he [Petitioner] had not been indicted upon the charges for which he was ultimately tried and that he had been denied adequate notice of the charges upon which he was tried; (2) that he had been denied his constitutional right of confrontation by reason of the introduction by the State of an alleged confession of a co-defendant; and (3) that he had been denied the right to cross-examine witnesses who testified against him (R. 72). He did not raise the question of judicial bias or prejudice which was however considered by the Court.

These were the only questions decided by the Ohio Supreme Court. In a dissenting opinion the question of a speedy public trial also was considered. It is Respondent's position that the dissent based this opinion on the statement, "I won't find him guilty if the evidence is substantial" (R. 86). Respondent submits that this statement taken

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32. U.S. Sup. Ct. Rule 19, 28 U.S.C.

out of context might support such a contention on the part of the dissenting judges. It is Respondent's position, however, that the court meant to say, "I won't find him guilty unless the evidence is substantial", which is borne out by the court's subsequent statement that *there is no question but that the court will require this* [that the State of Ohio prove each and every material allegation necessary on all counts] (R.22).[33] The dissent definitely based its contention with regard to speedy trial on an erroneous factual situation, namely that it believed the Petitioner to have been incarcerated in the county jail for the past eighteen months rather than two months, as was the fact (R. 87).

Rule 23 provides in pertinent part to the question here raised:

> "1. The petition for writ of certiorari shall contain in the order here indicated——
>
> "(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court.
>
> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (eg., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the

33. See note 24, *supra.*
34. U.S. Sup. Ct. Rule 23, 28 U.S.C.

federal question was timely and properly raised as to give this court jurisdiction to review the judgme on writ of certiorari.

"3. All contentions in support of a petition for w of certorari shall be set forth in the body of the petiti as provided in subparagraph (h) of paragraph 1 this rule. * * *"

A careful reading of petition filed herein fails to d close the contention of prejudice on the part of the tr court.

Rule 40[35] provides in pertinent part to the questi here raised:

"1. Briefs of an appellant or petitioner on the mer shall be printed as prescribed in Rule 39, and sh contain in the order here indicated——

"(d) (2) The phrasing of the questions present need not be identical with that set forth in the jurisd tional statement or the petition for certiorari, but t brief may not raise additional questions or change t substance of the questions already presented in th documents. Questions not presented according to t paragraph will be disregarded, save as the court, its option, may notice a plain error not presented."

The question of judicial prejudice was raised for t first time in Petitioner's brief filed herein.[36] It remai therefore, whether the question of judicial prejudice c stituted a "plain" error affecting the substantial rig of Petitioner within the meaning of R. 52 (b).[37]

2. The Acts and Words Of The Trial Judge, Viewi The Record As A Whole, Manifest That He Used Constitutional *Standard of Guilt.*

35. U.S. Sup. Ct. Rule 40, 28 U.S.C.
36. Page 3 of Petitioner's brief.
37. Rule 52 (b), Federal Rules of Criminal Procedures, 28 U.S.C.

Respondent considers that the trial itself was preceded by a colloquy by the court and counsel, during which it was determined how and under what conditions the trial was to proceed. The trial itself was divided into two sections, first the introduction of proof and secondly the findings of the court. The trial was followed by the imposition of sentence.

During the pretrial phase, counsel for Petitioner raised the question of *Prima facie* case for the first time as follows: "The only thing is, Your Honor, this matter is before the court on a prima facie case" (R. 21). This has every implication that Petitioner and his counsel had had prior discussions of this procedure and had determined that they would proceed in this manner; also that the procedure had been discussed with and acceded to by the prosecution. This is supported by the statement of Petitioner in his petition herein wherein he acknowledged certain waivers specifically made by him and further acknowledged that others had been made by his court appointed attorney, in whom he had trust.[38]

The court then indicated the understanding of a *prima facie* case to be one wherein there was to be no cross-examination of witnesses and likened it to be one where the defendant, *not technically or legally,* in effect admits his guilt and wants the State to prove it. A misunderstanding of the right to cross-examine was cleared up at this time (R. 21). All of this discussion took place in the presence and hearing of Petitioner, who interjected, "I would like to point out in no way am I pleading guilty to this charge" (R. 22). The court's reaction to this statement certainly was not one of prejudice. He advised the Petitioner who already had waived, in writing, a jury trial that, "If you want to stand trial we will give you a jury trial". Petitioner

38. Page 5, Petition for Writ of Certiorari.

then indicated that *he wanted to be tried by this cou* (R. 22).

It is here interposed that to answer the argument Petitioner's brief going to all matters concerning judici prejudice with respect to prejudgment of the case, a evidence thereof had accrued at this time; in spite of th Petitioner himself insisted on being *tried by this cou* Whether he subsequently was tried by a *prima facie* ca or a complete trial, the prejudice now inferred from t cold record by Petitioner's counsel and the dissenting opi ion below certainly was not then felt to be present either Petitioner or his trial counsel, nor did the majority of t Supreme Court of Ohio so find, even from the cold reco The court then told him, "Make up your mind whether y require a prima facie case or *a complete trial of it*" (R. 2 (Emphasis supplied). That Petitioner regarded this as offer to him of either type of trial is set forth in his pe tion for certiorari.[39] It should be noted that under Oh law, one who waives jury trial has a right to be tried by t court alone.[40] This section has been held to be mandato and the court cannot reject accused's election to waive ju trial. *State v. Smith,* 123 Ohio St. 237, 174 N.E. 768.

Respondent contends, therefore, the court at this poi offered Petitioner an alternative of a *prima facie* case or or a full trial before the court. At this juncture Petitione counsel indicated, "Prima facie, Your Honor, is all th we are interested in" (R. 22).[41]

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39. Page 7, Petition for Writ of Certiorari.

40. Ohio Revised Code, Section 2945.05 (1953).

41. To understand the reason why a *prima facie* case was sou by Petitioner's trial counsel, it is necessary to consider Ohio statut law with respect to pleas, which is set forth in Section 2943.03, O Revised Code. With respect to general pleas allowed therein only plea of guilty and not guilty are provided. There is no statutory p of nolo contendere in Ohio in felony cases, therefore, when one charged with a crime which he knows that he cannot successfully defe but a plea of guilty will subject him to a penalty in a civil

Before the trial started, therefore, Petitioner's attorney had agreed that the case was to be tried on a *prima facie* basis and that there would be no cross-examination of witnesses. This also was well known to Petitioner, who appeared to understand fully all that was taking place before him. The court had discussed the matter of no cross-examination of witnesses before it did the implication of the *Prima facie* case with respect to its effect, yet when Petitioner interjected that he was in no way pleading guilty, he did not object to the provision that no cross-examination would be allowed, nor did he complain that he had not been allowed to cross-examine at any time prior to sentence.

Petitioner's present contention that the pretrial colloquy amounted to a prejudgment of the case, therefore, is not justified. In effect, it amounted to no more than a pretrial conference held by the court and the opposing counsel to determine on what theory each side intended to base its case, the evidence that it intended to produce to support it and the number of witnesses that might be called to prove it in order that the court might be prepared to rule on any legal questions that might arise and to ascertain how long the trial might last.

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arising out of the same factual situation, he is without recourse to a plea of nolo contendere as is permitted in federal courts and certain other state courts. To circumvent this difficulty some Ohio courts have allowed, as was done here, the accused to enter a plea of not guilty and by arrangement require the prosecution to prove only a *prima facie* case. In such proceedings in Stark County, Ohio, the procedure was to require the State to prove only a prima facie case without the right by the defense to cross-examine witnesses and to present proof. In this case when defense counsel interviewed Petitioner, Petitioner was unable to afford him anything upon which he could base a defense. This is substantiated by the record wherein defense counsel, in a statement made in mitigation of sentence, said,

"* * * I might say to the court also, at the time of this occurence in October of 1960 the defendant was taking benzedrine, he was drinking heavily, he actually has right along, he has had no recollection of these events there and by virtue of his hospitalization in a federal hospital he has helped himself and was hoping he could continue as such." (R. 55)

The statement made several times in his brief that the court stated at the outset that Petitioner had admitted his guilt, just is not borne out by the record.

The record itself shows that Petitioner has denied only one of the crimes charged. When questioned by a deputy sheriff of Stark County, he denied any part of the breaking and entering of the Beacon Box Co. But he did not, at any time, deny the forgery or the uttering of the checks (R. 44). It is not unreasonable, therefore, to assume that before the trial began, the trier of facts had some knowledge of the case because without its concurrence such a procedure could not have been adopted (R. 80). In fact, it would be ridiculous for counsel for respondent to intimate to this court that trial court did not have some prior knowledge of the case with respect to the quantity and quality of the evidence available to the State, particularly when at least one of Petitioner's co-defendants, who apparently did remember the facts and circumstances surrounding the charged offenses, had pleaded guilty thereto in his court (R. 31).

The trial itself presented quite a different picture. At the outset of the trial the prosecutor said that, "The State of Ohio will prove each and every material allegation necessary [to prove the charges] in those particular cases by witnesses", to which the court replied, "There is no question the court will require that" (R. 22).

Aside from allowing the amendments to the indictments over defense counsel's objections heretofore set forth and the allowance of the checks supporting them in evidence, the record shows, that with the exception of one going to the admission of a sworn statement of a co-defendant, the court sustained every material objection made by the defense. In fact, the court even called to the attention of defense counsel an objectionable question going to the hear-

say establishment of the value of the alleged stolen property (R. 51). It did not allow in evidence State's Exhibit "F" even after defense counsel had indicated that he had seen it and had no objection to its admission (R. 49—50). The court further refused the State a continuance to allow the procuring of proof on the seventh and eighth counts of the forgery and uttering indictment and sustained the objection of defense counsel to the admission of State's Exhibit "D", upon which they were based.

Viewed as a whole, the trial phase of the proceedings failed to disclose any denial of fairness to Petitioner. This Court has held that the test of the denial of due process is that,

> "As applied to a criminal trial [in a State court] denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of due process we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial." *Lisemba v. California,* 314 U.S. 219, 236.

Federal courts have held that in making an appropriate application of such a test [in reviewing a State case in a habeas corpus action] an United States court will refuse to grant habeas corpus if it is satisfied from the record, as a whole, that the state court gave fair consideration to the issues, reached a satisfactory result, and protected the rights of the Petitioner under the Constitution of the United States. *Ramsey v. Hand,* (10th Cir. 1962) 309 F. 2d 947.

Under the federal Constitution's guarantee of due process, "[a] person accused of committing a crime is vouchsafed basic minimal rights; among these are the right to counsel, the right to plead not guilty and the right to be tried in a court room presided over by a judge". *Rideau v. Louisiana,* 373 U.S. 723, 726. In *Rideau* the court found

from the facts that Defendant had been tried several tim
by the public, via television wherein he had admitted t
crime, before he ever got into court and that members
the jury had seen the television programs; such is not t
case here. The Court also, citing *Brown v. Mississip*
279 U.S. 278, said that the state is free to regulate the pr
cedure of its courts in accordance with its own conceptio
of policy, but it does not follow that it may substitute tri
by ordeal. It hardly can be said that the procedure agre
upon by the court and defense herein falls in this categor

Certainly the trial judge herein was in no more a bias
position than a juror who contended that he could try
case fairly and impartially and render a verdict on the la
upon evidence even though he had formed some preco
ceived opinions based upon newspaper publicity. He havi
been allowed to sit, this Court held that such did not co
stitute a violation of Defendant's constitutional rights.
The Matter of August Spies et al, 123 U.S. 131.

And again this Court found that it was not prejudici
error where a juror who, although he had knowledge of t
case gleaned from the newspapers, and had indicated th
it would take some evidence to remove it stated that if t
evidence failed to prove the facts alleged in the newspaper
he would decide according to the evidence or lack of eviden
at the trial, and that he thought that he could try the ca
solely upon the evidence fairly and impartially. Mr. Justi
Holmes said, "The finding of the trial court upon t
strength of the juryman's opinions and his partiality
impartiality ought not to be set aside by a reversing cou
unless the error is manifest, which is far from being t
case [here]". *Holt v. United States,* 218 U.S. 245, 24
Herein, the court said that there was no question that t
State would have to prove each count charged.

Respondent takes the position that the burden of proving that the court herein was prejudiced is on the Petitioner. This Court has so held with respect to a juror; and in the case herein the court was fulfilling the jury function in deciding guilt or innocence. In *Reynolds v. United States*, 98 U.S. 145; 25 L. Ed. 244, 247, this Court held:

> "The affirmative of the issue [of prejudice] is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror will not necessarily be set aside, and it will not be the error of the court to refuse to do so."

And this Court has held unanimously, as recently as 1960, that:

> It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread, and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside an impression or opinion and render a verdict on the evidence presented at court." *Irvin v. Dowd*, 366 U.S. 717, 723. and "As stated in Reynolds the test is 'whether the nature and strength of the opinion formed are such as in the law necessarily * * * raised the presumption of partiality. The question presented is one of mixed law and fact * * *' at P. 156. 'the affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside * * * if a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed.' at P. 157." *Irvin v. Dowd, supra*, 723.

The court below found that the agreement entered into prior to the trial did not create a presumption of guilt nor that the trial court so considered it as follows:

> "* * * No presumption of guilt was created by such agreement. The state was required to prove all the essential elements of the offense. The court, from this evidence, then determined the guilt of the accused. That no presumption arose or was in the mind of the court is clearly exemplified by the fact that the court found petitioner not guilty on two of the counts with which he was charged. (R 81).

3. The Trial Court Made No Improper Inference Of Guilt Under The Law As It Obtained At The Time Of The Trial.

In making its finding the court did so as follows:

> THE COURT: As to count one, the testimony clearly shows beyond a reasonable doubt the defendant is guilty of count one, and also of count two, uttering and publishing, that check. Count Three, the count based on Ex. 'B', there isn't any question about the guilt of the defendant on that one, or on count four, the forgery of that check. The testimony is clear that all these checks were forged with defendant's knowledge and his presence at the time of the passing; the passing the court finds was done, some of them, by the defendant himself, and some by his co-defendant, a co-conspirator.
>
> "The Court finds the defendant guilty of . . . as charged in the indictment of #18139, except as to the 7th and 8th counts.
>
> "[fol. 64] Now coming to the indictment #18101 charging breaking and entering and grand larceny, there isn't any question there was a breaking and entering and the testimony of the co-conspirator Robert Mitchell, there isn't any question about his testimony which definitely makes the defendant present at the crime and guilty of that count. And as to all the evidence in this case the court finds the defendant is guilty of the second count of grand larceny. Besides this, in going to the question of guilt, of course, the

court states on matters of law the statute allows such as flight, failure of the defendant to take the stand in his own defense, and all other matters that are legally competent to be considered." (R—54)

The court found at the outset that on testimony introduced by the State, it clearly showed *beyond a reasonable doubt* that the defendant was guilty of counts one through six of the forgery and uttering indictment. With respect to the breaking and entering of grand larceny charges the court found that there was evidence to prove breaking and entering without question and the testimony of the co-conspirator, Robert Mitchell, [sworn statement of Robert Mitchell] unquestionably placed the Petitioner at the scene of the crime. This enabled the court to find Petitioner guilty of the breaking and entering and larceny indictment. The court then alluded to matters of law that he was allowed to consider such as flight, failure of Petitioner to take the stand and all other matters that are *legally competent* to be considered.

There is no inference that can be drawn from this statement other than the fact that the court was being scrupulously careful not to consider anything with respect to Petitioner's guilt other than those things which by law he could consider.

Petitioner admits that under the decision of *Tehan v. United States ex rel. Shott*, 52, U.S., January 19, 1966 the no-comment rule of *Griffin v. California*, 380 U.S. 609, was not applicable to this case. The subsequent argument that the court made unreasonable and unfair inferences of guilt in spite of *Tehan* are not supported by the cases cited. Both *Stewart v. United States*, 366 U.S. 1 and *Grunewald v. United States*, 353 U.S. 391, where cases involving trials in federal courts wherein the rule against self incrimination has long been protected under the Fifth Amendment to the

Constitution of the United States. With respect to State Proceedings, however, this restriction was not applicable until the decision of this court in *Malloy v. Hogan,* 378 U.S. 1, decided June 15, 1964, and until *Griffin v. California,* 380 U.S. 609 was decided it was not applicable with respect to adverse comments by the prosecutor or trial judge. Until then the states could rely upon the decision in *Twining v. New Jersey,* 211 U.S. 78 (1908), which held in a case wherein, after trial, the judge instructed the jury that it might draw an adverse inference from defendant's failure to testify, the court held explicitly and unambiguously, "That the exemption from compulsory self-incrimination in the courts of the state is not secured by any part of the federal constitution." *Twining v. New Jersey, supra,* at page 114. This rule has been followed consistently since then until *Malloy,* Cf; *Snyder v. Massachusetts,* supra, 105; *Brown v. Mississippi,* 297 U.S. 278, 285; *Adamson v. California,* 332 U.S. 46; *Cohen v. Hurley,* 336 U.S. 117, 127–129. Under this doctrine the trial judge herein had every legal right to consider the failure of Petitioner to take the stand under Article I, Section 10 of the Constitution of Ohio, which provides in part as follows: "* * * No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel * * *."

Petitioner further argues that herein there was an explanation for silence which not only was consistent with innocence, but left no room for an inference of guilt. This statement [that Petitioner was a victim of alcoholic amnesia] was made after the finding of guilty by way of mitigation. Had the statement been made by defense counsel prior to verdict, it still would not have raised an

inference of innocence under the facts of this case. Cf. *Babb v. United States,* (8th Cir. 1955) 351 F. 2d 863.

At the conclusion of a jury trial the trial court is required by law to charge the jury with respect to the presumption of innocence of the defendant and the burden of proof that is necessary to overcome the presumption. The court further must review the evidence to indicate what may or may not be considered by them in reaching a verdict. In a trial before the court without a jury the same consideration must be made by the court. There is nothing in the record to show that the judge did not follow such a mental procedure in this case; to the contrary the record supports the conclusion that it did so (R. 54).

Respondent contends that whereas a jury may be so prejudiced by many things that are presented to them during the course of a trial, that instructions that they must be disregarded are ineffectual, a trial court is well aware of his responsibilities with respect to all aspects of what constitutes a fair trial and will scruplously adhere to them. It is submitted that the trial court did so in this case. No defendant is insured that some error will not be made by the trial judge in ruling on objections or that his counsel will not overlook some objections that should be made. In short, he is not guaranteed a perfect trial, only a fair one. *Lutwak v. United States,* 344 U.S. 604, 619; *Fallen v. United States,* 343 F. 2d 844.

The court below found that Petitioner was afforded a fair trial and this finding is supported by the record.

And other cases cited by Petitioner in his brief hardly support the factual situation with which we are faced herein. At the outset Respondent agrees and further submits that Petitioner had a right to a fair hearing before an impartial judge. Counsel for Respondent having, as a defense counsel in Michigan, been a victim of such a pro-

cedure as was set forth in Murchison, agrees that when
judge had sat as a one man grand jury and then trie
witnesses appearing before the grand jury for contempt
it hardly can be said that the judge was unbiased. *In r*
Murchison, 349 U.S. 133.

And Respondent agrees that a mayor who depended upo
fines as his sole source of costs would likely stretch the fact
in favor of the State of an accused. *Tumey v. Ohio* 273 U.S
510. *State ex rel. Pratt v. Weygandt,* 164 Ohio St. 463; 13
N.E. 2d 191 is hardly applicable herein. That case deal
with the mandamus action to the Ohio Supreme Court t
remove a judge from hearing the case because of prejudice
Herein the Petitioner insisted on being *tried by the Cour*
It is acknowledged, however, that at page 469, the Suprem
Court did formulate a definition of the term "biased o
prejudiced" and it submitted that this is the criteria tha
the court applied in deciding the case herein.

In the face of Petitioner's insistence that he be tried b
the court and in so doing must have believed that the cou
would render an unbiased opinion, the facts in *Juelic*
hardly apply. There the court held "We have not yet foun
any decision, and we have been cited to none, wherein
defendant has been held to have had a fair trial afte
conviction by jury of twelve men, every member of whic
had sworn on voir dire that he had an opinion the defenda
was guilty." *Juelich v. United States,* (5th Cir. 1945) 214 F
2d 950, 955.

In *Irvin v. Dowd, supra,* and *Rideau v. Louisana, supr*
various types of widely circulated publicity had shown an
published confessions of the crimes charged and jurors wh
had read and seen the articles and programs, were allowe
to sit. Here Petitioner never, at any time, admitted hi
guilt before, during, or after trial.

With respect to the trial itself there were no instances where, as in *Maestas v. United States,* 341 F. 2d 493, a mistrial was denied because of improper examination of a prosecution witness which was repeated after an admonition to the prosecutor by the court; nor as in *Lane v. Warden,* 320 F. 2d 179 where evidence of defendant's criminal record was allowed to be presented to the jury at the outset of the trial and a motion for a mistrial was made and denied; nor as in *Rogers v. United States,* 304 F. 2d 520, wherein defendant was on trial for counterfeiting and, after eleven jurors had been accepted, a prospective twelfth juror on voir dire examination, and in the presence of the other eleven, said that as a director of a bank he had received some of defendant's money [counterfeit] three years before, after which a motion to discharge the jury was overruled; nor as in the case of *McFadden v. United* 63 F. 2d 11, where, after the court had refused to grant a severance before trial, sworn a jury and then allowed one co-defendant to plead guilty and subsequently refused to discharge the jury on motion of the remaining defendant.

Petitioner who insisted upon *being tried by this court* hardly can now say that *this court* was prejudiced because he knew that the co-defendants had formerly theretofore pleaded guilty or that he had served a prior sentence when it was agreeable to his counsel to allow a letter written by Petitioner from a penal institution in the evidence.

4. The Trial Judge Violated No Constitutional Right Of Petitioner During The Sentencing Phase Of This Case.

Prior to the adjudication of the sentence defense counsel requested to be heard ostensibly for the purpose of mitigation. He related that Petitioner had spent a considerable period of time in a federal institution under a federal sentence and that he had asked to be returned to stand trial

in Ohio. Counsel further stated that at the time the offense of which Petitioner stood convicted, took place, he wa drinking heavily and taking benzedrine and had no recollec tion of the events constituting the offenses charged. It i hardly likely that such a presentation would persuade th court under the facts presented in this case. While it i conceivable that a person under the influence of alcoho might not remember certain events that took place ove a considerable period of time [it is conceded by Respondent for instance, that Petitioner might not have remembere the burglary of the Beacon Box, Inc.] it is entirely incon ceivable that three different business people would cas a check for a person who was so intoxicated that he coul not remember the occasions.

The court had a right to wonder why he had elected t stand trial, yet failed to take the stand to explain this lac of memory and it used the words it did, however unfortun ate, to express its disbelief in Petitioner's explanation There is nothing in the record to indicate that the cour was hostile, harsh, or abusive in manner nor that it con demned Petitioner for pleading not guilty, only that i believed that Petitioner was taking a flier which, perhaps would be of some advantage to him.

The only excoriation that took place is in the mind o counsel. Now, and for the first time, the court considere a letter offered in evidence as Exhibit "F" which he ha refused to allow even though defense counsel had indicate that he had no objection [at R. 49]. He even indicated tha he had not used this information in his finding of guil on the merits when he said, "I can speak of it now" (R. 56).

And certainly Petitioner had no reason to expect a acquittal. He had been confronted by numerous State wit nesses, all of whom told a straightforward story and all bu

one of whom had a responsible position in the community; a sworn statement of a co-defendant was presented in evidence; and Petitioner presented no evidence of any kind in his defense. A failure to present evidence by way of mitigation in a *prima facie* case certainly is not consistent with the plea of not guilty.

Petitioner now contends that the manner in which the trial court reacted to defense counsel's mitigating statement was a basis for the imposition of an exceedingly heavy sentence. There is nothing in the record to support this contention, or that the court was giving Petitioner a heavier sentence than his co-defendants because he had pleaded not guilty as was done in *United States v. Wiley,* (7th Cir. 1960) 278 F. 2d 500; nor that he was given an unusually heavy sentence [where as in Illinois it is discretionary for the court to set the sentence] because he had pleaded not guilty. *People v. Moriarty,* 25 Ill. 2d 565, 185 N.E. 668. The fact is that herein the court made three of the sentences run consecutively, which in effect, extended the time for which Petitioner would be eligible for parole from ten months, as would have been the case if all sentences were to have run concurrently to twenty-seven months; the sentences on all other counts ran concurrently with the above. In the aggregate the sentence imposed was from three to sixty years. It would have been from eight to one hundred forty-two years, had the court made all sentences run consecutively which it had the right to do.

CONCLUSION

Respondent acknowledges that Petitioner was entitled to a fair trial; but it contends that the State also was entitled to a fair trial. Had Petitioner at the pre-trial colloquy, after his counsel had agreed to a *prima facie* case, the terms of which had been established clearly and fully, indicated by

act or deed that he did not agree with his counsel's strateg the prosecution then could have elected to present a com plete case and afford Petitioner the opportunity to challeng it. And had the trial court not considered that Petitione was in full accord with the procedure agreed upon, ther is little doubt that he would have insisted that Petitione avail himself of a complete trial. This is supported b Petitioner's own statement in his petition.

Petitioner should not now be allowed to come before thi Court and maintain that he had been deprived of his righ to "take the State by surpirse" or to "fool the State' because his counsel waived this right without his consent.

As Chief Judge Lumbard, speaking for the Secon United States Circuit Court of Appeals appropriately saic **"Every defendant must, of course, be accorded a fair tria But the state is also entitled to a fair trial. When, afte an extended hearing, informed and experienced defens counsel has taken a position, and the state, in reliance o it, has tried its case accordingly, it would be unduly tippin the scales of justice against the state to permit a defendar to argue that his conviction must be vacated because hi counsel should not have taken the position he did an should not have made the concession on which the stat acted."** *United States v. Richmond, supra,* at page 89.

Respondent respectfully urges this Court to affirm the de cision rendered by the Supreme Court of Ohio.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

No. 657.—October Term, 1965.

James Brookhart, Petitioner, *v.* Martin A. Janis, Director of Ohio Department of Hygiene and Correction.	On Writ of Certiorari to the Supreme Court of Ohio.

[April 18, 1966.]

Mr. Justice Black delivered the opinion of the Court.

The petitioner, James Brookhart, while serving the first of three consecutive sentences of from one to 20 years imposed by an Ohio Court of Common Pleas upon convictions of forgery and uttering forged instruments,[1] brought this action for habeas corpus in the Supreme Court of Ohio. There is no question raised about that court's jurisdiction. Petitioner charged and contends here that all his convictions are constitutionally invalid because obtained in a trial that denied him his federally guaranteed constitutional right to confront the witnesses against him (a) by permitting the State to introduce against him an out-of-court alleged confession of a co-defendant, Mitchell,[2] and (b) by denying him the right to cross-examine any of the State's witnesses who testified against him.[3] Master Commissioners appointed by

[1] Petitioner was also convicted in the same trial of breaking and entering and grand larceny. His sentences on these convictions were made to run concurrently with his sentences for forgery and uttering forged instruments.

[2] Mitchell pleaded guilty after being indicted with petitioner, was sentenced to an Ohio state reformatory, and although in the reformatory at the time of petitioner's trial, was not called to testify in person.

[3] The petition also charged that Brookhart had not been given adequate notice of the charges upon which he was tried because the indictment charging him with forgery and uttering false instruments was amended at trial. And in this Court petitioner Brookhart

the State Supreme Court recommended that habeas corpus be denied. They found that "petitioner although he did not plead guilty agreed that all the state had to prove was a prima facie case, that he would not contest it and that there would be no cross-examination of witnesses." This finding was not based on oral testimony but was based exclusively on an examination of the transcript of the proceedings in the trial court in which petitioner was convicted. The State Supreme Court accepted its Commissioners' view of waiver, stating that the transcript of the trial showed that:

> "In open court, while represented by counsel, petitioner agreed that, although he would not plead guilty, he would not contest the state's case or cross-examine its witnesses but would require only that the state prove each of the essential elements of the crime."

Upon this basis the State Supreme Court rejected petitioner's constitutional contentions and ordered him remanded to custody. 2 Ohio St. 2d 36, 205 N. E. 2d 911. We granted certiorari to determine whether Ohio denied petitioner's constitutional right to be confronted with and to cross-examine the witnesses against him. 382 U. S. 810.

In this Court respondent admits that:

> "[I]f there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it."

This concession is properly made. The Sixth Amendment provides that: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with

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attacks his convictions on several other constitutional grounds. We find it unnecessary to decide any of these additional contentions set out in this note.

the witnesses against him . . . ." And in *Pointer* v. *Texas*, 380 U. S. 400, 406, we held that the confrontation guarantee of the Sixth Amendment including the right of cross-examination "is 'to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.' *Malloy* v. *Hogan, supra*, 378 U. S., at 10." See also *Douglas* v. *Alabama*, 380 U. S. 415. It follows that unless petitioner did actually waive his right to be confronted with and to cross-examine these witnesses, his federally guaranteed constitutional rights have been denied in two ways. In the first place he was denied the right to cross-examine at all any witnesses who testified against him. In the second place there was introduced as evidence against him an alleged confession, made out of court by one of his co-defendants, Mitchell, who did not testify in court, and petitioner was therefore denied any opportunity whatever to confront and cross-examine the witness who made this very damaging statement. We therefore pass on to the question of waiver.

The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, see, *e. g.*, *Glasser* v. *United States*, 315 U. S. 60, 70–71, and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U. S. 458, 464.

In deciding the federal question of waiver raised here we must, of course, look to the facts which allegedly support the waiver.[4] Upon an examination of the facts

[4] When constitutional rights turn on the resolution of a factual dispute we are duty bound to make an independent examination of the evidence in the record. See, *e. g.*, *Edwards* v. *South Carolina*, 372 U. S. 229, 235; *Blackburn* v. *Alabama*, 361 U. S. 199, 205, n. 5.

shown in this record, we are completely unable to agree with the Supreme Court of Ohio that this defendant petitioner intelligently and knowingly waived his right to cross-examine the witnesses whose testimony was used to convict him. The trial record shows the following facts: Petitioner was arraigned January 29, 1962, without a lawyer, and pleaded not guilty to all charges against him. Two days later the court appointed counsel to represent him. Not able to make bond, he remained in jail until March 23, 1962, at which time he was brought before the judge for trial. There petitioner's appointed counsel told the judge that the defendant had signed waivers of trial by jury and wanted to be tried by the court. The judge in order to verify the waivers showed petitioner the two written waivers of trial by jury bearing his signature and asked him if the signature was his. Petitioner said it was. The following colloquy among the judge, petitioner, and his counsel then took place in open court:

"MR. ERGAZOS [Petitioner's lawyer]: That[']s correct, Your Honor.

"THE COURT: Anything further?

"MR. KANDEL: Nothing further.

"MR. ERGAZOS: The only thing is, Your Honor, this matter is before the court on a prima facie case.

"THE COURT: There being no . . . going to be no cross-examination of the witnesses, so the court will know and the State can't be taken by surprise, the court doesn't want to be fooled and have your client change his mind half way through the trial and really contest it, the State has a contest, we want to know in fairness to them so they can put on complete proof.

"MR. ERGAZOS: I might say this, Your Honor, if there is any testimony adduced here this morning which leaves any question as to this defendant in

connection with this crime I would like to reserve the right to cross-examine at that time.

"THE COURT: That is raising another . . . that is putting the State on the spot and the court on the spot, I won't find him guilty if the evidence is substantial.

"MR. ERGAZOS: We have a jury question in the court, undoubtedly there will be . . .

"THE COURT: Ordinarily in a prima facie case . . . the prima facie case is where the defendant, not technically or legally, in effect admits his guilt and wants the State to prove it.

"MR. ERGAZOS: That is correct.

"THE COURT: And the court knowing that and the Prosecutor knowing that, instead of having a half a dozen witness on one point they only have one because they understand there will be no contest.

"A [Brookhart] *I would like to point out in no way am I pleading guilty to this charge.*

"THE COURT: If you want to stand trial we will give you a jury trial.

"A I have been incarcerated now for the last eighteenth months in the county jail.

"THE COURT: You don't get credit for that.

"A For over two months my nerves have been . . . I couldn't stand it out there any longer, I would like to be tried by this court.

"THE COURT: Make up your mind whether you require a prima facie case or a complete trial of it.

"MR. ERGAZOS: Prima facie, Your Honor, is all we are interested in.

"THE COURT: All right." (Emphasis supplied.)

From the foregoing it seems clear that petitioner's counsel agreed to a prima facie trial. By agreeing to this truncated kind of trial—if trial it could be called—we can assume that the lawyer knowingly agreed that the

State need make only a prima facie showing of guilt and that he would neither offer evidence on petitioner's behalf nor cross-examine any of the State's witnesses. The record shows, however, that petitioner himself did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea and in which he would not have the right to be confronted with and cross-examine the witnesses against him. His desire not to agree to such a trial is shown by the fact that immediately after the judge accurately stated that in a prima facie case the defendant "in effect admits his guilt," Brookhart personally interjected his statement that "I would like to point out in no way am I pleading guilty to this charge." Although he expressly waived his right to a jury trial, he never, at any time, either explicitly or implicitly, pleaded guilty. His emphatic statement to the judge that "in no way am I pleading guilty" negatives any purpose on his part to agree to have his case tried on the basis of the State's proving a prima facie case which both the trial court and the State Supreme Court held was the practical equivalent of a plea of guilty. Our question therefore narrows down to whether counsel has power to enter a plea which is inconsistent with his client's expressed desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him. We hold that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances. It is true as stated in *Henry* v. *Mississippi*, 379 U. S. 443, 451, that counsel may, under some conditions, where the circumstances are not "exceptional, preclude the accused from asserting constitutional claims . . . ." Nothing in *Henry*, however, can possibly support a contention that counsel for defendant can override his client's desire expressed in

open court to plead not guilty [5] and enter in the name of his client another plea—whatever the label—which would shut off the defendant's constitutional right to confront and cross-examine the witnesses against him which he would have an opportunity to do under a plea of not guilty. Since we hold that petitioner neither personally waived his right nor acquiesced in his lawyer's attempted waiver, the judgment of the Supreme Court of Ohio must be and is reversed and remanded to that court for further proceedings not inconsistent with this opinion.

It is so ordered.

[5] Compare *Rideau* v. *Louisiana*, 373 U. S. 723, 726.

SUPREME COURT OF THE UNITED STATES

No. 657.—October Term, 1965.

James Brookhart, Petitioner, v. Martin A. Janis, Director of Ohio Department of Hygiene and Correction. | On Writ of Certiorari to the Supreme Court of Ohio.

[April 18, 1966.]

Separate opinion of Mr. Justice Harlan.

I do not find the issue in this case as straightforward as does the Court. If the record were susceptible only to the reading given it by the Court, I would concur in the judgment. However, for me this case presents problems of two sorts.

First, the precise nature of the "rights" that were allegedly "waived" are not wholly clear. One view, adopted by the Court, is that petitioner's lawyer in effect entered a conditional plea of guilty for the defendant. Another interpretation, which is certainly arguable, would find the agreement between petitioner's counsel and the trial court to involve no more than a matter of trial procedure. I believe a lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval. The decision, for example, whether or not to cross-examine a specific witness is, I think, very clearly one for counsel alone. Although it can be contended that the waiver here was nothing more than a tactical choice of this nature, I believe for federal constitutional purposes the procedure agreed to in this instance involved so significant a surrender of the rights normally incident to a trial that it amounted almost to a plea of guilty or *nolo contendere*. And I do not believe that under the Due

Process Clause of the Fourteenth Amendment such a plea may be entered by counsel over his client's protest.

Second, given the need for petitioner's approval of the entry of such a plea, the further question arises whether petitioner did in fact agree to be tried in a "prima facie" trial without the opportunity to cross-examine witnesses. The Supreme Court of Ohio, on the basis of an examination of the record, found that petitioner "agreed that all the state had to prove was a prima facie case, that he would not contest it, and that there would be no cross-examination of witnesses." *Brookhart* v. *Haskins*, 2 Ohio St. 2d 36, 38, 205 N. E. 2d 911, 913. This Court, after an independent examination of the relevant portion of the same record, reprinted, *ante*, pp. 4–5, finds that petitioner "did not intelligently and knowingly agree to be tried in a proceeding which was the equivalent of a guilty plea . . . ." *Ante*, p. 6.

The decisive fact is of course the state of petitioner's mind—his understanding and his intention—when his counsel stated to the trial court: "Prima facie, Your Honor, is all we are interested in." My reading of the record leaves me in substantial doubt as to what petitioner's actual understanding was at the end of the pertinent courtroom colloquy, a doubt that is enhanced by the general unfamiliarity that seems to exist with this Ohio "prima facie" practice.* I cannot see how the

*The Supreme Court of Ohio characterized the procedure as "unusual," 2 Ohio St., at 39, 205 N. E. 2d, at 914. At oral argument, the Assistant Attorney General of Ohio noted that he had been unaware of such a procedure, and that the practice could not be found in any statute or rules of court. The State explains the procedure as follows: "There is no statutory plea of nolo contendere in Ohio in felony cases, therefore, when one is charged with a crime which he knows that he cannot successfully defend, but a plea of guilty will subject him to a penalty in a civil suit arising out of the same factual situation, he is without recourse to a plea of nolo contendere as is permitted in federal courts and certain other state

question can be satisfactorily resolved solely on the existing record. I would therefore vacate this judgment and remand the case for a hearing under appropriate state procedures to determine whether petitioner did in fact knowingly and freely choose to have his guilt determined in this type of trial. Failing the availability of such proceedings in the state courts, the avenue of federal habeas corpus would then be open to petitioner for determination of that issue.

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courts. To circumvent this difficulty some Ohio courts have allowed, as was done here, the accused to enter a plea of not guilty and by arrangement require the prosecution to prove only a *prima facie* case." Brief, at 44–45, note 41.